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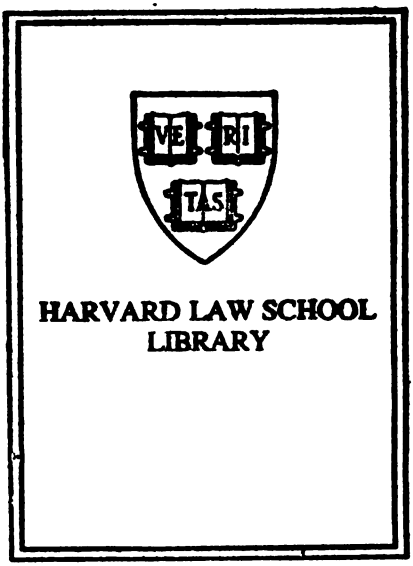

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22

VOL. 72. MICHIGAN REPORTS.

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1:95 Wis 374

10:35 LRA 562n

43:9 LRA 778n

71:10 LRA 237n

76:155 Mas 486
15 LRA 448
23 LRA 198

122:7 LRA 301n
10 LRA 80n

134:18 LRA 456n
39 LRA 494n

194:7 LRA 277n

206:20 LRA 435n
22 LRA 227

235:37 LRA 477n

240:3 LRA 253
7 LRA 760n
11 LRA 124n

249:79 Wis 529
2 LRA 56n

265:9 LRA 676

278:2 LRA 714
5 LRA 254n
6 LRA 270n
8 LRA 243n
9 LRA 209n
38 LRA 170n

285:10 LRA 80n

295:84 Fed 116

316:8 LRA 114n

355:47 Fed 861

363:9 LRA 611n

367:20 LRA 609n

388:16 LRA 34n

393:12 LRA 371n

398:10 LRA 226n
12 LRA 364n
13 LRA 162n
23 LRA 219

420:36 LRA 732n

438:7 LRA 671n
10 LRA 148n
22 LRA 615n
26 LRA 800n

446:7 LRA 145n
7 LRA 369n
8 LRA 326n
8 LRA 858n
11 LRA 355n
11 LRA 491n
14 LRA 846n
16 LRA 63
18 LRA 556n
23 LRA 344n
28 LRA 788
34 LRA 489
37 LRA 398

454:72 Fed 557
7 LRA 793n
29 LRA 624n

560:165 US 165
41 LEd 672
6 LRA 780n
9 LRA 621n
13 LRA 98n
14 LRA 586n

571:136 US 431
34 LEd 406

603:20 LRA 408n
24 LRA 302n
38 LRA 51n

638:8 LRA 306n

651:7 LRA 82n
32 LRA 511

654:8 LRA 81n

659:79 Fed 290
22 LRA 478n

669:25 LRA 746

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22

MICHIGAN REPORTS.

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

OCTOBER 19, 1888 TO NOVEMBER 28, 1888.

WILLIAM D. FULLER,

STATE REPORTER.

VOL. 72.

CHICAGO:
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For 1890.

SUPREME COURT.*

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[TERM EXPIRES DECEMBER 31, 1891.]

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CHARLES D. LONG, . . .	FLINT, ...	Dec. 31, 1897.
CLAUDIUS B. GRANT, . .	MARQUETTE, . . .	Dec. 31, 1899.

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MOSES R. TAYLOR, . . .	CRIER, ...	LANSING.
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* For composition of Court during period covered by Vol. 71, see Vol. 68, page iii.
† Appointed to fill vacancy caused by the death of Mr. Justice CAMPBELL.
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RECORDER'S COURT OF DETROIT,

GEORGE S. SWIFT. . . . . F. H. CHAMBERS.

(Jan. 1, Mar. 5, May 7, July 2, Sep. 8, Nov. 5, 1890.)

SUPERIOR COURT OF GRAND RAPIDS, EDWIN A. BURLINGAME.

(Mar. 10, May 12, Sep. 8, Dec. 8, 1890.)

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TABLE OF CASES REPORTED

IN VOLUME 72,

WITH DIGEST OF POINTS DECIDED.

A.

PAGE

ALCONA TOWNSHIP, FLETCHER v., ... 18

AUDITOR GENERAL, LONGYEAR v., ... 415

AUDITOR GENERAL, SAGE v., ... 638

AVELING v. NORTHWESTERN MASONIC AID ASSOCIATION, . . 7

Benefit association — Certificate of membership — Beneficiaries—Will.

AVERY v. DE WITT, ... 25

Estates of deceased persons—Personal property in hands of executor is assessable in town where deceased last dwelt, prior to notice of distribution.

B.

BEGOLE v. STONE, ... 71

Sale—Retention of title as security—*Bona fide* incumbrancer —Charge to jury.

BERNIER v. BERNIER, ... 48

Equity practice—Lack of defendant's signature is good ground for striking answer from the files, unless waived by replication—Bill seeking relief which may be secured at law should be verified—If sought by using answer as cross-bill, under rule 123, answer must be verified—Revised Statutes of United States cannot be governed by previous legislation when differing from it—Government homestead—Beneficial interest in uncompleted entry vests in minor children, on death of both parents, to the exclusion of those of full age.

Digitized by Google

PAGE

BOARD OF RAILROAD CROSSINGS, FLINT & PERE MARQUETTE R. R. CO. v., ... 284

BOARD OF REGISTRATION, WARREN v., ... 398

BOEING, O'CALLAGHAN v., ... 669

BROCKWAY v. PATTERSON, ... 122

Liquor traffic—Death of husband from blow received from an intoxicated person — Widow has right of action for consequent injury to her means of support—She need not show whether the intoxication was the natural cause of the act of violence—The act itself fixes the liability upon the person selling the liquor causing the intoxication—Evidence of previous habits of husband as a drinking man admissible as bearing upon amount of damages sustained —Also proof that he was peaceable when sober, and quarrelsome when drunk, as bearing upon the question of his intoxication at the time — In awarding damages life expectancy of husband as well as of wife should be considered—Also his ability during such period to support his wife—Jury—Good ground of challenge that proposed juror is so prejudiced against defendant or his business as to prevent him from doing justice to his testimony.

BROWN, QUINNIN v., ... 804

BURKHARDT, PEOPLE v., ... 172

BURNHAM v. HASKINS, ... 235

Assignment for benefit of creditors—Bill by creditor to set aside mortgage, claimed to be fraudulent as a preference —If assignee is charged with being a party to its execution, no order of court requiring assignee to bring such suit is required—Creditor may sue in his own name.

C.

CARMICHAEL v. CARMICHAEL, ... 76

Will—Agreement to make certain disposition of property by will is valid and binding—On the facts of this case, such an agreement, resting partly in parol and covering real estate, is enforced.

CHARLOTTE, CITY OF, HINES v, ... 278

Digitized by Google

PAGE

CHESEBROUGH v. PINGREE, ... 438

Lease—If exclusive possession of land occupied by leased buildings is necessary to the enjoyment of the demise, the land passes as an incident—Statute of frauds—Lease for more than one year, signed by an agent without written authority, is void, and is not validated by after execution of duplicate by principal, unknown to lessee.

CHICAGO & GRAND TRUNK RY. CO., THOMAS v., ... 855

CHILD v. DETROIT MANUFACTURING CO., ... 623

Cross-examination—Facts relating to those sworn to on direct examination, and bearing upon the issue, may be shown on cross-examination—A defense confined to a refutation of facts alleged in declaration, and necessary to be proved to make plaintiff's case, may be made under the general issue.

CITY PLANING & SHINGLE MILL CO. v. MERCHANTS', ETC., INSURANCE CO., ... 654

Fire insurance—Clause voiding policy in case the mill shall cease to be operated, construed to mean something more than a mere temporary suspension.

CLEAVER, EASTMAN v., ... 167

CLEMENT, PEOPLE v., ... 116

CLEVELAND IRON MINING CO. v. HUSBY, ... 61

New trial in equity—Not granted to impeach testimony of a witness—Nor because of his perjury, unless fully established by judicial determination or written documents.

COBURN v. MUSKEGON BOOMING CO., ... 134

Logs and logging — Case involves the alleged unlawful obstruction of Muskegon river by defendant, whereby plaintiff was prevented from delivering logs in the river.

CORNETT, GATES v., ... 420

D.

DEHN, STAHL v., ... 645

DELAWARE & HUDSON CANAL CO. v. ROBERTS, ... 49

Pleading—Notice of recoupment—Contract.

Digitized by Google

PAGE

DENNIS v. LEATON, ... 586

Damages—For failure to deliver lumber under contract—It is the difference between contract price and cost of replacing it.

DETROIT, CITY OF, SCHNEIDER v., ... 240

DETROIT FREE PRESS CO., PARK v., ... 560

DETROIT, G. H. & M. RY. CO., STURGIS v., ... 619

DETROIT MANUFACTURING CO., CHILD v., ... 623

DETROIT MUSEUM OF ART, DONALDSON v., ... 82

DEVENS, SWEENEY v., ... 301

DEWITT, AVERY v., ... 25

DIAMOND MATCH CO. v. VILLAGE OF ONTONAGON, ... 249

Streets—As between land-owner and municipal corporation claiming a public street over such land, the burden of proof is upon the municipality—Act of Congress for relief of citizens of towns upon government lands, and Act No. 204, Laws of 1861, relating to same subject, construed—Purchasers from a proprietor who has platted land, but not so as to effect a legal dedication, are entitled to have streets necessary to the enjoyment of their lots kept open for their use and that of the public—If private rights are not involved, the proprietor may reclaim and close such streets—He is not estopped as against municipality claiming street, where the public have not acquired rights by user, or acceptance of offer to dedicate indicated by the platting—Word "lot" defined—Proof of acceptance of land dedicated by the owner must be unequivocal and convincing.

DONALDSON v. DETROIT MUSEUM OF ART, ... 82

Contracts—Competitive designs for building—Award.

DOUGLASS v. DOUGLASS, ... 86

Statute of limitations—Disability of married women to sue removed by Legislature of 1855—Requirements of equity as to diligence in asserting rights, stated—Express trust in land cannot rest in parol.

DOWNING, HOWES v., ... 41

Digitized by Google

E.

PAGE

EASTMAN v. CLEAVER, ... 167

Measurement—If manner of is fixed in contract, evidence of another mode is irrelevant—As between each other, it is competent to show which was principal and which was surety—Settlement—Competent for party alleging to testify whether it was final or not, when that point is in issue

EAST SAGINAW & ST. CLAIR R. R. CO., TOLEDO, SAGINAW & MACKINAW R. R. CO. v., ... 206

EASTWOOD, LINDSAY v., ... 336

EDDY v. MERCHANTS, ETC., INS. CO., ... 651

Mutual fire insurance companies—Territorial limits for transaction of business—Constitutional law.

ETTER, PEOPLE v., ... 175

EVANS, PEOPLE v., ... 367

F.

FISHER, NEWKIRK v., ... 113

FLETCHER v. TOWNSHIP OF ALCONA., ... 18

Taxes—Standing timber—Ownership of is an interest in the land—Is not "forest products," within the meaning of tax law of 1885—If reserved on a sale of the land, is not assessable as personal property—Land should be assessed at its true cash value, including timber

FLINT & PERE MARQUETTE R. R. CO. v. BOARD OF RAILROAD CROSSINGS, ... 234

Railroad companies—Condemnation proceedings.

G.

GATES v. CORNETT, ... 420

Mental competency — Burden of proof is on party who seeks to set aside his contracts because of mental incompetency—Party dealing with one known to him to be of weak intellect has burden of showing good faith of transactions, when challenged—Contracts with insane persons

Digitized by Google

PAGE

Gates v. Cornett.—Continued.

held void, but only voidable if with persons of weak intellect—If latter contracts have been executed by one party, and are executory upon the part of the imbecile, they can only be set aside at his instance by his doing equity.

GOODRICH v. SHAW, ... 109

Deed—Mental incompetency of grantor—Duress.

GORDON, NEWTON v., ... 642

GRAHAM, HILL v., ... 659

H.

HALL v. PERRY, ... 202

Taxes—Law of 1885 prospective only in its operation—Sale thereunder for taxes of 1882 and 1883 void—Section 2 of Act No. 17, Laws of 1887, attempting to validate such sales, is unconstitutional—Irregularities may be cured by retrospective legislation, but not acts void in their inception.

HAMILTON v. HARRIS, ... 56

Judgment creditors' bill—Order for payment to receiver of money in defendant's possession, drawn from a partnership of which he claimed to be a member, affirmed.

HARRIS, HAMILTON v., ... 56

HART v. MCELROY, ... 446

Statutes—Question of how far the Court will examine legislative journals to determine validity of statutes discussed.

HASKINS, BURNHAM v., ... 235

HICKS, PEOPLE v., ... 181

HICKS v. TURCK, ... 311

Specific performance of contract by grantees in possession of land lying in another state, to secure the purchase by note and purchase money mortgage, decreed.

Digitized by Google

PAGE

HINES v. CITY OF CHARLOTTE, ... 278

Municipal corporations—Do not become insurers of property within their corporate limits from destruction by reason of the neglect or refusal of their officers and agents to enforce their ordinances.

HILL v. GRAHAM, ... 659

Taxes—Section 5, Act No. 153, Laws of 1885, held directory, and to be construed with section 89 of same act—*Lumber Co. v. Collins*, 66 Mich. 64, and *Dairy Co. v. McKinlay*, 70 Id. 574, construed—Question as to when saw-logs are in transit, discussed—Replevin will not lie when property was liable to assessment and tax proceedings are fair upon their face.

HILLMAN v. SCHWENK, ... 68 Mich. 301

HOWES v. DOWNING, ... 41

Bill for specific performance of contract—Payment—Finding of court.

HUDSON v. ROOS, ... 363

Sale—Of article for particular purpose, known to the vendor, and by sample—On discovery of latent defect, it may be returned by the vendee.

HUSBY, CLEVELAND IRON MINING CO. v., ... 61

J.

JOHNS, THEISEN v., ... 285

JOHNSTON HARVESTER CO. v. MILLER, ... 265

Evidence—Witness testifying to execution of note may be cross-examined as to what took place at time of signing—If he claims to have taken note as agent for plaintiff, and denies knowledge, at the time, of the illegality of the consideration, and that he has made statements out of court, admitting such knowledge, defendant may prove them as a part of his defense—If the execution of the note is denied by the defendant, he may show on the cross-examination of the agent his negotiation of a prior forged note purporting to be signed by defendant, as affecting the credibility of the witness—Handwriting—

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PAGE

Johnston Harvester Co. v. Miller.—Continued.

Accuracy of expert witnesses who testify from comparison to a disputed signature may be tested by showing them other signatures properly in evidence, purporting to be made by the same person, but which were not, and examining them in regard to the same—Principal and agent—If the principal accepts and sues upon a note which the agent procured through fraud, he cannot claim to be a *bona fide* holder because not advised by agent of circumstances under which note was taken at time of forwarding it to the principal, who was led to believe that it was taken in the ordinary course of the agency.

JULIUS KING OPTICAL CO. v. TREAT, ... 599

Evidence—Of agent that he sold certain goods for a price named, held competent—Notice to produce papers held insufficient as to time — Question calculated to raise improbabilities in favor of party asking it, held proper —On proof of sale and delivery of goods, presumption arises that sale was for cash—Burden on vendee to prove that it was on credit—In such a case evidence of financial condition of vendee held competent—Memorandum on letter received in evidence, the author or purpose of which is not shown, is no part of the letter, and not admissible.

K.

KENNEDY, PLUMMER v., ... 295

KIRSTEN, TOWNSHIP OF OTSEGO LAKE v., ... 1

L.

LAMB, SUTTON v., ... 340

LAPHAM, MCGRAW v., ... 191

LEATON, DENNIS v., ... 586

LEPPER, PERRIN v., ... 454

LINDSAY v. EASTWOOD, ... 336

Drain taxes—Became a lien, under drain law of 1881, as soon as they became a charge on the land by the assess-

Digitized by Google

PAGE

Lindsay v. Eastwood.—Continued.

ment of benefits by the drain commissioner—Action of supervisor in extending tax merely ministerial—Delay of commissioner in presenting assessment list to supervisor, or of that officer in extending tax, does not invalidate lien.

LONGYEAR V. AUDITOR GENERAL, ... 415

Taxes—Labor and money tax voted by electors under How. Stat. sec. 1327, is distinct from $1,000 commissioner of highways is authorized to expend under How. Stat. secs. 1379, 1380, upon the bridges of his township—Record of commissioner held sufficient.

LORSCHER V. SUPREME LODGE KNIGHTS OF HONOR, ... 316

Benefit associations—This case involves a discussion of the rules and regulations governing the Knights of Honor, duty of subordinate lodges, when contract of insurance takes effect, and proofs of death.

M.

MARTIN, MCNAUGHTON V., ... 276

MCELROY, HART V., ... 446

MCFARLAN, MEIGS V., ... 194

MCGRAW V. LAPHAM, ... 191

Bailment—Deposit of money—Liability of bailee.

MCNAUGHTON V. MARTIN, ... 276

Taxes—Tax law of 1885, prospective only in its operation—Sales made thereunder for taxes assessed under 1882 law, void.

MEIGS V. MCFARLAN, ... 194

Mortgage—Assignment of land contract, as security, is a mortgage—Practice on bills to redeem is settled against strict foreclosure in case of default, except in peculiar cases.

MERCHANTS', ETC., INSURANCE CO., CITY PLANING & SHINGLE MILL CO. V., ... 654

MERCHANTS', ETC., INS. CO., EDDY V., ... 651

Digitized by Google

PAGE

METROPOLITAN LIFE INSURANCE CO., TEMMINK v., ... 388

MILLER, JOHNSTON HARVESTER CO. v., ... 265

MILLS v. TOWNSHIP OF RICHLAND, ... 100

Taxes—Evidence that proceedings incident to tax levy have been taken in conformity to law is only such as is required to prove similar facts in other cases—Where the law requires written evidence of the action taken, it must be shown by the record—This rule does not exclude the usual presumptions in favor of official action—Certificate signed by supervisor and one of the persons appointed as member of board of review, and by one not so appointed, shows review by legally constituted quorum—Legality of the division of a township by board of supervisors, not inquirable in suit involving legality of assessment—"Ordinary Expenses" of township defined—Amount due on division of township, and contingent fund to meet unforeseen exigencies, fall within this term—Town board may provide for raising money to pay same—Expenses incurred in establishing lost section corners, and in building town-hall, not so included, and must be voted by electors—Highway tax of 50 cents on $100 valuation, authorized by How. Stat. secs. 1326, 1327, should be spread according to assessed valuation of preceding year—Payment of land taxes prior to January, under specific protest, not voluntary.

MURRAY, PEOPLE v., ... 10

MUSKEGON BOOMING CO., COBURN v., ... 134

N.

NEWKIRK v. FISHER, ... 113

Taxes—Return of land by treasurer essential to a valid sale—Absence of supervisor's certificate from assessment roll, from which leaves appear to have been removed—In absence of proof, no presumption arises that the roll or absent leaves ever contained certificate.

NEWTON v. GORDON, ... 642

Pleading—In an action under How. Stat. sec. 2119, plaintiff need not aver the owner's knowledge of the vicious habits of his dog.

NORTHWESTERN MASONIC AID ASSOCIATION, AVELING v., . . 7

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O.

PAGE

O'CALLAGHAN v. BOEING, ... 669

Commissions on sale of real estate—Evidence—Charge to jury—Argument of counsel.

ONTONAGON, VILLAGE OF, DIAMOND MATCH CO. v., ... 249

OTSEGO LAKE TOWNSHIP v. KIRSTEN, ... 1

Evidence—Books of township treasurer are competent evidence of his indebtedness to the township—Supervisor who took part in the settlement with treasurer, and examined his books and vouchers, may testify to amount found due—If amount due is undisputed, and no well-grounded apprehension exists as to legal liability of bondsmen, a release of the treasurer or his sureties by township board is unauthorized.

P.

PARK v. DETROIT FREE PRESS CO., ... 560

Constitutional law—Libel law of 1885 held not within the power of constitutional legislation—Law of libel, as applicable to newspapers, discussed—Parties and those interested in private suits may control files and papers—Public have no right to their contents until it is secured in open court—Evidence that plaintiff's attention was called to libelous articles by other persons, admissible.

PATTERSON, BROCKWAY v., ... 122

PEOPLE v. BURKHARDT, ... 172

Criminal law—Malicious injury to building.

PEOPLE v. CLEMENT, ... 116

Criminal law—Statute of limitations—Making complaint not sufficient to arrest running of—Issuance of warrant, and delivery to officer for service, essential—Complaint for offense not triable by justice may be oral—Better practice is to reduce it to writing—How. Stat. sec. 9507, does not apply to prosecutions for seduction—Offender, if he flees from the State, may be prosecuted as a fugitive from justice—Question of issue and delivery of warrant to officer, if in dispute, is for the jury.

Digitized by Google

PAGE

PEOPLE v. ETTER, ... 175

Criminal law—Trial of case in justice's court by private attorney, held not error on facts of this case—*Certiorari*—Errors not shown by the return cannot be relied on—Official knowledge of justice must determine the result.

PEOPLE v. EVANS, ... 367

Criminal law—Indorsement of names of witnesses on information after jury is sworn—Respondent should be granted time to prepare his defense—On the facts of this case, continuance should have been for the term—Error to allow jury to separate, and re-assemble after several weeks, and try the case—Challenge for cause on admission of juror that he has heard case discussed, and of a strong public sentiment, should be sustained, notwithstanding he states that he thinks he has not been influenced by what he has heard—If juror denies stating that he believed respondent guilty, court should hear testimony of party to whom such statement is claimed to have been made, and, if in doubt, discharge the juror—On facts of this case, evidence of frequent charges by prosecutrix of assaults upon her person by others than respondent held admissible—Error to permit prosecutor to comment to jury upon failure of respondent to produce affirmative evidence of good character, which is not cured by instructing jury to disregard such argument—Duty of prosecuting attorney stated—Error to present as the theory of the defense one at variance with that upon which the whole defense rests—Return by magistrate that offense has been committed, and that there is probable cause to believe respondent guilty thereof, must precede filing of information—Return after such filing will not give the court jurisdiction to proceed on such information.

PEOPLE v. HICKS, ... 181

Criminal law—After jury in justice's court retire to consider their verdict, and before rendering same, prosecuting attorney has no right to interfere with them at all.

PEOPLE v. MURRAY, ... 10

Criminal law—Intoxication, while no legal excuse for, may have an important bearing upon the quality of, the

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PAGE

People v. Murray.—Continued.

crime committed, and should influence in determining the extent of the punishment—The Supreme Court will reverse a conviction if, upon a review of all of the proceedings, it can see that respondent has not had a fair trial, and that manifest injustice has been done him, whether objections and exceptions were or were not taken by his counsel—If reference is made in the charge to portions of the people's testimony, the respondent's testimony and explanations relating to the same subject should also be referred to—In the absence of requests to charge, it is the duty of the court to see that the case goes to the jury in a clear and intelligent manner, and he should state to them fully the law applicable to the facts—The sentence should never be for a term exceeding the average period of persons in prison life, which seldom exceeds 25 years, where the punishment is for a term of years to be fixed by the court.

PEOPLE v. PERRIMAN, ... 184

Criminal law—Amendment of information for bigamy, by changing name of county where first marriage took place, sustained—The only important fact is the existence of the two marriages—Possible to show valid marriage with no means to show its time or place—Indorsement of names of witnesses on information, after its filing, sustained—Testimony of eye-witness to a marriage more reliable, in most cases, than documentary evidence—If he swears to seeing a man and woman joined together by a marriage ceremony, performed seriously, by a person acting in the character of a clergyman or magistrate, he testifies to what is a valid marriage, unless clearly made illegal by statute—Official character, lay or clerical, may be shown by reputation—Copy of purported marriage certificate recorded in another state, not certified as required by act of Congress, and not conforming to any rule of this State on the subject, not admissible as proof of such marriage—Permitting private attorney to assist prosecuting attorney, held not error on facts stated in head-note 10.

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PAGE

PEOPLE v. PRAGUE, ... 178

Criminal law—Respondent may be convicted of assault with intent to do great bodily harm, less than the crime of murder, under an information charging assault with intent to murder—Deposition taken on preliminary examination—May be introduced in evidence by prosecution.

PEOPLE v. ROUSE, ... 59

Liquor traffic—How. Stat. sec. 2275, contemplates immediate imprisonment, which may continue 90 days, with or without payment of fine and costs—Imposition of lighter sentence than law allows, not error, if it does not involve a different kind of punishment.

PERRIMAN, PEOPLE v., ... 184

PERRIN v. LEPPER, ... 454

Testamentary powers—Wills—Executors and administrators—Accounting—Death of executor—Liability of representative—Partnership—Surviving partner—Duties of—Death of survivor—Trusts—Rights of beneficiaries—Fraudulent appropriation of trust fund—Laches of beneficiaries—Summary relief—Rights of third persons—Guardian and ward—Agreement between—Fraudulent character of—Equity practice—Reference to commissioner—Appealable orders.

PERRY, HALL v., ... 202

PINGREE, CHESEBROUGH v., ... 438

PLUMMER v. KENNEDY, ... 295

Board of supervisors—Have exclusive authority over the erection of county poor-houses, with power to appoint such agents as they choose to execute it—Members when appointed as a committee, with power to let contracts for such erection, become agents of the board within the letter and spirit of section 1, Act No. 45, Laws of 1885—Act No. 94, Laws of 1883, requiring a bond in such cases from the contractor for payment for labor and materials, is constitutional.

PRAGUE, PEOPLE v., ... 178

Digitized by Google

Q.

PAGE

QUINNIS v. BROWN, ... 304

Mortgage—Priority as between mortgagee, and assignee of a definite interest in mortgage—On facts of this case, the assignee is held so entitled.

R.

RENSENHOUSE v. SEELEY, ... 603

Mutual benefit associations—Foreign corporations—Right to carry on business in Michigan—Life insurance.

RICHELIEU & ONTARIO NAVIGATION CO. v. THAMES & MERSEY MARINE INSURANCE CO., ... 571

Marine insurance—Acceptance of abandonment fixes the rights of the parties, and renders insurers liable as for a total loss—Placing vessel in dry-dock, and causing her to be repaired at an expense exceeding half her value, coupled with failure to return or offer to return her to owners, held an acceptance by which title passes to underwriters They may refuse acceptance until inquiry can be made into cause of the accident—Cannot accept vessel and defer such inquiry until after suit is brought, and then claim acceptance not conclusive—Notice of abandonment, in this case, held sufficient.

RICHLAND TOWNSHIP, MILLS v., ... 100

ROBERTS, DELAWARE & HUDSON CANAL CO. v., ... 49

ROOS, HUDSON v., ... 363

ROUSE, PEOPLE v., ... 59

S.

SAGE v. AUDITOR GENERAL, ... 638

Taxes—For 1882 and 1883, assessed under 1882 law, became a lien on the land enforcible under 1885 law after 1887 law took effect—Board of supervisors cannot raise, as a part of the county tax, money to be expended generally upon township highways—Supervisor can only assess taxes properly certified to him by town clerk, or evidenced by other proper official action, and such as the law makes it his duty to assess.

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PAGE

SCHNEIDER v. CITY OF DETROIT, ... 240

City of Detroit—Under charter, as existing in 1885, had right to build a bridge in a street for a railroad crossing, subject to payment of damages for injury to private property.

SCHWENK, HILLMAN v., ... 68 Mich. 301

SEELEY, RENSENHOUSE v., ... 603

SHAW, GOODRICH v., ... 109

SIBLEY, WEBSTER v., ... 630

SKINNER, TRAVIS v., ... 152

STAHL v. DEHN, ... 645

Contract for repurchase—Equity favors the right of redemption—An absolute conveyance will not be turned into a mortgage from the mere fact of an agreement to reconvey, with or without an advance in price, but such a contract is sometimes strong evidence in that direction—If parties intended an absolute sale, and a contract for a repurchase, such intention must control—Courts will look beyond the writings to the circumstances surrounding the transaction.

STEPHENSON, TURNER v., ... 409

STONE, BEGOLE v., ... 71

STURGIS v. DETROIT, G. H. & M. RY. CO., ... 619

Railroad companies—Trespassers upon open track are there at their own risk—When company has provided reasonable facilities for ingress and egress from station-houses, its full duty is performed—Not bound to suppose that passengers who do not know the way will neglect the means open to their sight, and go off in the darkness somewhere else.

SUPREME LODGE KNIGHTS OF HONOR, LORSCHER v., ... 816

SUTTON v. LAMB, ... 340

Under an agreement by the payor to send to the payee goods at a designated place, on which the payee was to pay the freight and indorse the agreed price on the payor's notes, the sale is held to be complete on the receipt of the goods, when the indorsement should be made.

Digitized by Google

PAGE
SWEENEY v. DEVENS, ... 301

Fraud—Established by a preponderance of evidence.

SWEET v. WOODIN, ... 393

Bills and notes—Indorser entitled to prompt notice of dishonor—Notary must use such means as are reasonably calculated to find his residence—His duty is to apply to officers of his own bank, and, if residence unknown to them, to inquire where note is payable—His search should be real, and not formal—Second indorser makes himself joint maker by putting his name above that of payee, who has indorsed for accommodation of maker, and he cannot have recourse to such indorser as liable to him in the order of time.

T.

TEMMINK v. METROPOLITAN LIFE INSURANCE CO., ... 388

Life insurance—Case involves alleged false answers and concealment of state of her health by the applicant—Presents no point practically open in this State.

THAMES & MERSEY MARINE INSURANCE CO., RICHELIEU & ONTARIO NAVIGATION CO. v., ... 571

THEISEN v. JOHNS, ... 285

Jury—Challenge for cause—Lies to juror, in liquor suit, who swears that he has a prejudice against the legal sale of liquor, or against the enforcement of the law forbidding sales to minors—Error in denying challenge, not cured by exercise of right of peremptory challenge by the party, where the record shows that he exhausted such right—In suit for damages for sale of liquor to minor under the age of 18 years, under Act. No. 92, Laws of 1877, proof of sales by others to the minor is inadmissible—Plaintiff entitled, in such a case, to $50 actual damages, at least, and such amount of exemplary damages, not exceeding amount claimed in declaration, as jury may award under all of the circumstances of the case.

THOMAS v. CHICAGO & GRAND TRUNK RY. CO., ... 355

Railroad company—May prohibit passengers riding on freight trains, or prescribe the conditions of their trans-

Digitized by Google

PAGE

Thomas v. Chicago & Grand Trunk Ry. Co.—Continued.

portation—Rule forbidding conductors receiving fare on freight trains, or allowing persons to travel thereon as passengers without written permit from designated officers, is a reasonable one—Duty of conductor to enforce such rule—He is not to be governed in his action by any agreement the passenger claims to have made with the ticket agent, where ticket is good only on passenger trains—One cannot sue for the breach of one duty and recover for the breach of another.

TOLEDO, A. A. & N. M. RY. CO., WILLIS v., ... 160

TOLEDO, SAGINAW & MACKINAW R. R. CO. v. EAST SAGINAW & ST. CLAIR R. R. CO., ... 206

Condemnation proceedings—This case involves the question of the right of condemnation of crossings over railroads for the purposes of spur tracks, etc., for another road.

TRAVIS v. SKINNER, ... 152

Highways—Opinion of commissioner as to cost of repairing bridge, under How. Stat. sec. 1881, is controlling, and will not be coerced by *mandamus*.

TREAT, KING OPTICAL CO. v., ... 599

TURCK, HICKS v., ... 311

TURNER v. STEPHENSON, ... 409

Adverse possession—Of one parcel of land, under a recorded deed covering an adjoining parcel, will not of *itself* give the occupant title to the *latter* parcel.

W.

WARREN v. BOARD OF REGISTRATION, ... 398

Registration—Voter should be registered where he boards, where the only question of his residence for election purposes is whether his lodging room or his boarding place governs.

WEBSTER v. SIBLEY, ... 630

Evidence—In suit by executors, where the making of a verbal contract is in issue, defendants may put before the jury every fact and circumstance tending to show

Digitized by Google

PAGE

Webster v. Sibley.—Continued.

its non-existence—Ownership of estimates of timber made by land-looker for land-owner, and paid for, is a question of law—Until testimony necessarily shows that fact must have been equally within the knowledge of a deceased party, it ought not to be excluded—When failure to demand payment of claim is a circumstance against its existence depends upon the circumstances of each case—Charge to jury—Error to give construction to important testimony or undue prominence to testimony of very doubtful character, prejudicial to the rights of either party.

WILLIS v. TOLEDO, ANN ARBOR & N. M. RY. CO., ... 160

Railroad companies—Station agent held to have no authority to employ porter—Not for jury to determine whether work done under such employment is beneficial to company.

WOODEN v. WOODEN, ... 347

Husband and wife—May bargain with each other, and husband may convey land directly to his wife in payment of debt due her—She will not lose her rights by not making them known, even as to one dealing with the husband in ignorance of them—Assessment of land to husband after such conveyance, held no proof of fraud—Registry laws are for protection of subsequent purchasers and incumbrancers—Indebtedness of grantor will not avoid a deed if he retains ample means to pay his debts.

WOODIN, SWEET v., ... 393

Digitized by Google

MICHIGAN CASES CITED.

A.

PAGE

Allen v. Antisdale, 38 Mich. 229.... 352
Alt v. Lalone, 54 Mich. 303..... 177
Annis v. People, 13 Mich. 511..... 387
Attorney General v. Amoe, 60 Mich. 372, 380..... 453
Attorney General v. Rice, 64 Mich. 385.....449, 451

B.

Baker v. Johnston, 21 Mich. 319.... 260
Bank v. McAllister, 46 Mich. 397.... 352
Bank v. Whittle, 48 Mich. 1..... 353
Barry v. Briggs, 22 Mich. 201..... 541
Barstow v. City of Big Rapids, 56 Mich. 35..... 31
Board of Supervisors v. Banks, 44 Mich. 407..... 260
Bronson v. Bruce, 59 Mich. 467..... 570
Brown v. Ins. Co., 65 Mich. 306..... 392
Bullard v. Green, 9 Mich. 222..... 541
Bushford v. People, 24 Mich. 244.... 384
Buskirk v. Strickland, 47 Mich. 389 260

C.

Campau v. Campau, 44 Mich. 33.... 412
Campau v. Lafferty, 43 Mich. 429... 444
Campbell v. White, 22 Mich. 178... 401
Champlain v. Stamping Co., 68 Mich. 238..... 629
Chittenden v. Witbeck, 50 Mich. 401.....552, 556
Churchill v. Circuit Judge, 56 Mich. 540..... 375
County of Wayne v. Miller, 31 Mich. 447..... 260

D.

Davenport v. Auditor General, 70 Mich. 192.....204, 417
Davis v. Walker, 18 Mich. 25..... 149
DeMoss v. Robinson, 46 Mich. 62... 85
Derwin v. Parsons, 52 Mich. 426.... 381

PAGE

Detroit v. Railroad Co., 23 Mich. 173, 209..... 260
Dull v. Merrill, 69 Mich. 49..... 352
Dwight v. Blackmar, 2 Mich. 330 .....552, 556

E.

Ellsmore v. Gamble, 62 Mich. 543.. 634

F.

Faxton v. Faxon, 28 Mich. 159..... 85
Flower v. Witkovsky, 69 Mich. 371. 128
Frederick v. Railroad Co., 37 Mich. 343..... 360

G.

Galloway v. Corbitt, 52 Mich. 460... 177
Goodman v. Nester, 64 Mich. 662.... 204
Gott v. Culp, 45 Mich. 265..... 556
Gray v. Barton, 62 Mich. 197..... 63
Green v. Graves, 1 Doug. 351..... 451
Greusel v. Hubbard, 51 Mich. 95.... 397

H.

Hall v. Perry, 72 Mich. 202..... 277
Hanna v. People, 19 Mich. 316..... 180
Harbaugh v. Cicott, 33 Mich. 243... 400
Hardy v. Powell, 40 Mich. 415..... 412
Hartford Ins. Co. v. Raymond, 70 Mich. 485..... 619
Heath v. Waters, 40 Mich. 457, 466 .....541, 552, 556
Herrick v. City of Big Rapids, 53 Mich. 555..... 31
Hill v. Wright, 49 Mich. 229..... 668
Humphrey v. Auditor General, 70 Mich. 293.....204, 205, 277, 639
Hyde v. Powell, 47 Mich. 156..... 352

I.

In re Selby, 6 Mich. 193, 208.....264, 264

Digitized by Google

K.

PAGE

Kimball v. Ward, Walk. Ch. 439... 45
King v. Merritt, 67 Mich. 217..... 98
Kirby v. Ingersoll, 1 Doug. 477..... 541

L.

L. S. & M. S. Ry. Co. v. People, 46 Mich. 198..... 149
Lewis v. Campau, 14 Mich. 458..... 541
Loomis v. Armstrong, 49 Mich. 521.. 556
Loomis v. Smith, 37 Mich. 595..... 352
Lucas v. Wattles, 49 Mich. 363..... 149

M.

Macumber v. Booming Co., 53 Mich. 195..... 148
Marathon v. Oregon, 8 Mich. 362.... 107
McCreery v. Green, 38 Mich. 185.... 149
Michigan Dairy Co. v. McKinlay, 70 Mich. 574..... 665
Miller v. Morse, 23 Mich. 365..... 63
Millerd v. Ramsdell, Har. Ch. 373.. 552
Monaghan v. Ins. Co., 53 Mich. 238, 246.....6, 292
Moore v. Cheeseman, 23 Mich. 332.. 45
Moyer v. Fletcher, 56 Mich. 508.... 556
Mundy v. Foster, 31 Mich. 313..... 85
Murray v. Hudson, 65 Mich. 670.... 412

N.

Navigation Co. v. Insurance Co., 58 Mich. 132..... 573
Nester v. Busch, 64 Mich. 657..... 204
Northwestern Transportation Co. v. Ins. Co., 59 Mich. 228..... 585

O.

Owen v. Hill, 67 Mich. 43..... 301

P.

Peninsular Iron, etc., Co. v. Township of Crystal Falls, 60 Mich. 79, 510..... 109
People v. Arnold, 43 Mich. 303..... 181
People v. Beaubien, 2 Doug. 256.... 260
People v. Blodgett, 13 Mich. 127.... 401
People v. Clark, 33 Mich. 113..... 121
People v. Cline, 44 Mich. 290..... 384
People v. Eaton, 59 Mich. 559..... 181
People v. Hobson, 48 Mich. 29..... 177
People v. Howard, 50 Mich. 240..... 618
People v. Jones, 6 Mich. 176..... 260
People v. Lynch, 29 Mich. 274..... 120
People v. Petheram, 64 Mich. 252.. 174

PAGE

People v. Simonson, 10 Mich. 335... 541
People v. Supervisor, 16 Mich. 254.. 451
People v. Sweeney, 55 Mich. 583.... 180
Petrie Lumber Co. v. Collins, 66 Mich. 64..... 665
Perrin v. Judge, 49 Mich. 345..... 490
Perrin v. Lepper, 49 Mich. 347..... 490
Perrin v. Lepper, 56 Mich. 351..... 533
Pontiac v. Carter, 33 Mich. 164..... 245

R.

Roberts v. Kelsey, 38 Mich. 602..... 556
Rock River Paper Co. v. Fisk, 47 Mich. 212..... 486
Rue High, 2 Doug. 515..... 401

S.

Scripps v. Reilly, 35 Mich. 371..... 569
Scripps v. Reilly, 38 Mich. 10..... 569
Shackelton v. Fire Office, 55 Mich. 288..... 658
Sheldon v. Rice Estate, 30 Mich. 296..... 552, 556
Skinner v. Wilhelm, 63 Mich. 568.. 658
Smith v. Walker, 57 Mich. 456-488.. 541
Steele v. Thompson, 42 Mich. 596... 292
Steketee v. Kimm, 48 Mich. 328..... 567
Stubly v. Beachboard, 68 Mich. 422. 271
Stupetski v. Ins. Co., 43 Mich. 373.. 658
Sweetzer v. Higby, 63 Mich. 13..... 239
Sword v. Keith, 31 Mich. 247..... 85

T.

Thomas v. Collins, 58 Mich. 64..... 204
Township of Boardman v. Flagg, 70 Mich. 372..... 6
Tryon v. Association, 39 Mich. 636.. 569
Turner v. People, 33 Mich. 363..... 387
Turner v. People, 33 Mich. 369..... 120

V.

Village of St. Johns v. McFarlin, 33 Mich. 72..... 284

W.

Watkins v. Wallace, 19 Mich. 57.... 304
White v. Millbrook, 60 Mich. 533... 109
Whiting v. Butler, 29 Mich. 144.....444

Y.

Yaner v. People, 34 Mich. 286..... 387
Youngs v. Cunningham, 57 Mich. 153..... 412

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OCTOBER TERM, 1888.*

THE TOWNSHIP OF OTSEGO LAKE v. ADELBERT KIRSTEN ET AL.

Townships—Bond of treasurer—Authority of board to release sureties—Evidence—Bias of juror—Challenge.[1]

1. In a suit upon a township treasurer's bond, his books are competent evidence to show his indebtedness to the township.
2. A supervisor who took part in a settlement with a township treasurer, and examined his books and vouchers, may testify to the amount found due the township.
3. Where on a settlement with a township treasurer the amount due the township, and for which he fails to account, is undisputed, and no well-grounded apprehension exists as to the legal liability of the bondsmen for the debt, the township board has no legal authority to release the principal or his sureties from his or their legal obligation to pay the amount to the township.
4. A juryman may be asked which side he would be inclined to favor if, at the close of the testimony, it was equally balanced as between the parties, to ascertain his bias, if any exists, to aid counsel in determining as to the exercise of his right to a peremptory challenge. *Monaghan v. Ins. Co.*, 53 Mich. 288.

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Error to Otsego. (Kelley, J.) Argued June 22, 1888. Decided October 19, 1888.

Assumpsit on town treasurer's bond. Defendants bring error. Affirmed. The facts are stated in the opinion.

Main J. Connine (A. A. Crane, of counsel), for appellants, contended:

* Continued from Vol. 71.
[1] For full digest of points decided, see *Table of Cases Reported.*

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1. Townships may sue and be sued, and have the right to settle suits and to compromise claims for or against themselves in order to avoid costs and expenses; citing *Supervisors v. Bowen*, 4 Lans. 24; *Meech v. Buffalo*, 29 N. Y. 198; *Petersburg v. Mappin*, 14 Ill. 193; *Supervisors v. Birdsall*, 4 Wend. 460; *Stewart v. Ahrenfeldt*, 4 Denio, 139; 1 Dill. Mun. Corp. §§ 477, 478; and this gives the township board power to accept notes, as in the case at bar; citing *County of Sac v. Hobbs*, 72 Iowa, 69 (33 N. W. Rep. 369); and the acceptance of such negotiable paper is *prima facie* a satisfaction of the debt: *Kearslake v. Morgan*, 5 Term R. 513.
2. A municipal corporation, in protecting its property and collecting its debts, when not expressly prohibited, or when not otherwise provided by statute, may avail itself of all the rights and remedies afforded to an individual; citing *Buffalo v. Bettinger*, 76 N. Y. 393; *Bank v. Bank*, 92 U. S. 122; *Augusta v. Leadbetter*, 16 Me. 45; *Russel v. Cook*, 3 Hill. 504.
3. Doubtful or disputed claims may always be compromised by a municipality, and the claim of the township was doubtful, from the fact that at nearly every meeting the township board found a different amount due, and because from the pecuniary condition of the defendants it was doubtful whether a judgment could be enforced against them.
4. The compromise of disputed claims furnishes a sufficient consideration for the mutual promises of the parties, and, where fairly made, such a compromise is binding, whether it be of a doubtful question of law or fact; citing *Grandin v. Grandin*, 49 N. J. Law, 508 (9 Atl. Rep. 759), and cases cited; *Baumier v. Antiau*, 65 Mich. 31; *Korne v. Korne*, 30 West Va. 1 (3 S. E. Rep. 21), and cases cited.

A. D. Marshall and *T. A. E. & J. C. Weadock*, for plaintiff, contended for the rule stated in the opinion as to right to compromise the claim.

CHAMPLIN, J. Adelbert Kirsten was township treasurer of the town of Otsego Lake. To qualify himself to act he gave to the township a bond, as required by law, with Hyman Joseph and De Witt Wilson as sureties.

At the close of his official term the township board examined and audited his accounts as such treasurer, and found that he was indebted to the township in the sum

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of $1,037.71. The township board immediately notified the sureties of this fact, and that the township would hold them responsible on the treasurer's bond.

The board commenced their examination on April 15, 1887, and concluded it on the 18th. On the 16th Kirsten secured his sureties by a bill of sale on his stock of goods. The money found due the township not having been paid, this action was brought upon the township treasurer's bond.

The surety Hyman Joseph, and the principal, Adelbert Kirsten, defend on the ground that, after the amount of the defalcation was ascertained, the township board settled with the sureties, and took their several and respective promissory notes in full of all claims against them. These defendants appeared by separate attorneys, and pleaded separately.

On the trial of the cause the plaintiff introduced the books of the township treasurer, from which it appeared that he was indebted to the town in the sum stated. There does not appear to have been any conflict in the testimony respecting this fact, and it may be regarded as undisputed. It was proved by the record and by the testimony of the witnesses who examined the accounts.

This testimony was competent, and there was no error in overruling the objections of defendant's counsel to the introduction of the township treasurer's books in evidence, nor in permitting the supervisor, who was a member of the township board, and who took part in the examination of the books and vouchers, to answer the question,—

"What sum was found to be due from Kirsten to the township?"

The township board and Kirsten met for the purpose of looking over his accounts, and to ascertain how much, if any, was due to the township, and there was no valid objection to his stating what sum they found to be due.

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After the plaintiff rested its case, the counsel for defendants, to maintain the issue on their part, offered in evidence the record of the proceedings of the plaintiff township board, as recorded on pages 102 and 103 of their record, being the proceedings of a meeting of that board held on April 20, 1887, for the purpose of showing that on that day the said township board settled all claims of the township against defendant Adelbert Kirsten, as its treasurer, and against defendants Hyman Joseph and De Witt Wilson, as sureties on his official bond, both arising on said bond, and otherwise, and then and there accepted the promissory notes of said Joseph and said Wilson, due in one year thereafter, whereby all action on said bond became suspended until such notes were due, and whereby all remedy upon said bond became superseded; and for the purpose of showing that said township has no right of action against said Joseph and Wilson, arising out of said suretyship, until said notes became due; to which offer counsel for plaintiff objected as incompetent, irrelevant, and immaterial, which objection was by the court sustained, for the reason that the township board had no power to make such a settlement as the one set forth in the minutes of the meeting; to which ruling counsel for defendants then and there excepted; the record of which proceedings so offered in evidence and so excluded upon objection is in the words and figures following:

"APRIL 20, 1887.

"At a meeting of the township board, duly convened and held.

"Present, Charles W. Bahel, supervisor; A. R. Vanderwoort, justice of the peace; A. Assal, township clerk. Absent, Frank Buell, justice of the peace.

"Board called to order by C. W. Bahel in the chair.

"The business of the meeting was stated to be the adjustment of the matter caused by the default of A. Kirsten, the outgoing treasurer, to account for the bal-

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ance of $2,485.98 found to be due the township on settlement with said treasurer.

"In adjustment of said matter it was moved and supported that we accept the notes of the bondsmen of said treasurer for the sum of $368.50 each, payable in one year from date, together with the agreement to the effect that, if there is no error discovered in the collection of the taxes of 1886 made by said treasurer, the said treasurer will be released from the payment of the sum of $300, making the amount of the shortage of $1,037.71. Motion carried.

"Moved and supported that the supervisor take charge of the notes given by the bondsmen of A. Kirsten. Carried.

"Moved and supported that we adjourn *sine die.*

"C. W. BAHEL, Supervisor.
"A. ASSAL, Township Clerk."

The insufficiency of the defense under which this proof was offered is that it nowhere appears that the claim of the township for the balance of $1,037.71 against Kirsten, was either disputed or doubtful. Kirsten had received this amount of money, which he had not accounted for or paid over as required by law, and the township board had no legal authority to release either Kirsten or his sureties on his bond from his and their legal obligation to pay the amount to the township. The action of the board was, in effect, making a gratuity to Kirsten of over $300 of the township's money, without necessity, right, or authority. Tax-payers might justly complain of such action as an illegal perversion of the township's money. Had it been a disputed claim, or if there had existed any well-grounded apprehension as to the legal liability of the bondsmen for the debt, it might have afforded grounds for a compromise.

No reason appears for the extraordinary action of the board taken on April 20, but the record shows that on April 22 a full board was duly convened, and by a unanimous vote it was resolved that counsel be employed, and

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suit brought upon the bond, thus ignoring, as well they might, the action taken on the 20th.

This is a much stronger case than that of *Township of Boardman v. Flagg*, 70 Mich. 372 (38 N. W. Rep. 284), where a settlement had been made, and a balance struck, which the township treasurer paid over to his successor. Afterwards it was ascertained that he had collected moneys belonging to the township, which did not appear upon his books from which the settlement was made, and was not included in the settlement, and it was held that the township clearly had the right to recover the money still remaining in the treasurer's hands, and that the township was not estopped by the settlement made by the township board.

Error is also assigned upon a question, which was permitted to be put to a juryman when being selected to try the cause, by the plaintiff's attorney, as follows:

"Suppose, at the close of the testimony, it was equally balanced as between the plaintiff and defendants, which side would you be inclined to favor?"

The juryman answered:

"Well, I think I should favor the sureties. I won't be certain. I think so."

The counsel afterwards challenged this juror peremptorily, and he was excused.

The point was decided in *Monaghan v. Ins. Co.*, 53 Mich. 238, 246 (18 N. W. Rep. 797).[1]

The judgment of the circuit court must be affirmed.

The other Justices concurred.

[1] Such interrogation was held proper.

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RICHARD AVELING, ADMINISTRATOR OF THE ESTATE OF ROBERT AVELING, DECEASED, v. THE NORTHWESTERN MASONIC AID ASSOCIATION.

Benefit associations—Certificate of membership—Beneficiaries—Will.

In this case it is held that while, technically speaking, the decedent may not have died seized of the insurance held by him in the defendant association, his intention was to pass it by his will to plaintiff, as also all of his other property, and the judgment is affirmed.

Error to Wayne. (Reilly, J.) Argued June 22, 1888. Decided October 19, 1888.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

E. H. Flinn and *W. I. Culver (Edwin F. Conely,* of counsel), for appellant, contended:

1. The decedent did not die seized of the insurance. It constituted no part of his estate, nor would it pass to the administrator, or be included in a general devise of his estate; citing *Benefit Ass'n v. Priest*, 46 Mich. 429; *Benefit Ass'n v. Firnane*, 50 Id. 82; *Ballou v. Gile*, 50 Wis. 614; *Folmer's Appeal*, 87 Penn. St. 133; *McClure v. Johnson*, 56 Iowa, 620; *Olmstead v. Society*, 37 Kan. 93 (14 Pac. Rep. 449).
2. The insurance, therefore, in the absence of a specific devisee thereof, under the power of appointment contained in the certificate, would pass directly to the heirs at law as the persons who would take under the contract; citing *Arthur v. Ben. Ass'n*, 29 Ohio St. 557; *Fenn v. Lewis*, 10 Mo. App. 478; *Bishop v. Curphey*, 60 Miss. 22; *Ins. Co. v. Miller*, 13 Bush, 489; *Duvall v. Goodson*, 79 Ky. 224 (9 Ins. Law J. 901); *Ben. Ass'n v. Clendinen*, 44 Md. 429; *Greeno v. Greeno*, 23 Hun, 478; *Ben. Ass'n v. Sears*, 114 Ill. 108.

Oscar M. Springer (Henry A. Chaney, of counsel), for plaintiff, contended:

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1. If any precedent is needed for treating an ordinary devisee as the proper beneficiary, it may be found in *Smith v. Ben. Ass'n*, 24 Fed. Rep. 685; *Worley v. Aid Ass'n*, 10 Id. 227.

MORSE, J. The defendant is a corporation organized and existing under the laws of the state of Illinois.

March 5, 1885, it issued to Robert Aveling a certificate of insurance, in which it agreed to pay the sum of $2,500 upon his death—

"To his devisees, or, if no will, to the heirs at law of said Robert Aveling."

Robert Aveling died on February 21, 1887, leaving the following last will and testament:

"I, Robert Aveling, of the township of Springwells, county of Wayne, State of Michigan, being in good health and sound mind and memory, do make this my last will and testament:

"I will, devise, and bequeath all those certain lots, known as lots 115, 116, 117, and 118 of J. W. Johnson's subdiv. of the east half of private claim 78, in the township of Springwells, joining the city of Detroit, north of the Chicago road, so called; also the undivided one-half of lot 124, same subdivision, with all the appurtenances thereon. I also devise and bequeath all other property of which I shall die seized, real, personal, and mixed, especially all money in Detroit Savings Bank and Wayne County Savings Bank, Detroit, Mich., all bonds and notes and stocks, to Richard Aveling, of the city of Detroit, county of Wayne, State of Michigan, to him, his heirs and assigns forever.

"Witness my hand and seal at * * * aforesaid.

"ROBERT AVELING. [Seal.]

"Signed, sealed, and declared to be the last will and testament of the testator, in our presence and in the presence of each other, who at his request have signed our names as witnesses, this * * *

"JOHN THOMAS.
"ARTHUR GARD."

This will was admitted to probate in Wayne county, May 10, 1887, and on the same day his brother, the plaintiff, was duly appointed administrator of his estate,

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with the will annexed. He demanded of the defendant payment to himself of the entire sum due on the certificate. Payment being refused, he brought this suit. He recovered in the court below.

The suit is defended by the defendant on the sole ground—

"That the certificate of insurance does not make the right to the insurance depend upon the accident of being named in the will as a devisee of something else, but that it confers upon the insured a power of appointment, under or by virtue of which he may designate in his will the devisee or devisees of his insurance. In case the insured fails to exercise this power of appointment, the insurance passes directly to his heirs at law."

It was shown upon the trial that the deceased left surviving him one sister and the children of a deceased sister.

It will be seen by the will that the plaintiff is the sole devisee of all the property of the decedent. But it is argued that, although he is the sole and general devisee, the testator in his will specifically named most of the property, if not all of it, bequeathed to plaintiff, and made no mention of the insurance, thereby showing no intent to will it to him, as the words "shall die seized" would not include the insurance, as he did not die seized of it; that such insurance would not pass to his administrator, nor would it be included in a general devise of his estate, as it constituted no part of his estate at the time of his death.

While, technically speaking, the decedent may not have died seized of this insurance, we are satisfied that he intended to pass his insurance, as well as all of his other property, to the plaintiff.

The circuit judge was right, and the judgment will be affirmed, with costs.

The other Justices concurred.

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THE PEOPLE v. HORACE MURRAY.

Criminal law—Intoxication of respondent at time of offense—Trial—Duty of court—Charge to jury—Requests—Excessive sentence.

1. While the intoxicated condition of a respondent at the time of the commission of an alleged rape cannot furnish any legal excuse for what he did, it has an important bearing upon his turpitude and the quality of his crime, and should have an important influence in determining the extent of the punishment to be inflicted.

2. While this Court cannot reverse a judgment or set aside a verdict upon a review of the facts, when properly submitted to the jury, and will not ordinarily depart from such rules of practice as have been adopted as the result of the longest experience, yet, under its general superintending power and control over all inferior courts, and their proceedings, given under its appellate jurisdiction, in a criminal case, upon a review of all the proceedings which have resulted in a conviction, if the Court can see that the respondent has not had a fair trial, and it is made manifest that injustice has been done, it becomes the imperative duty of the Court, with or without objections and exceptions by the respondent's counsel, to set aside such proceedings, and order a new trial, and the present presents such a case.

3. If any of the testimony, as given by the people's witnesses, is especially referred to and narrated in the charge to the jury, the testimony and explanations relating to the same subject on the part of the respondent should also be referred to.

4. In the absence of any requests from counsel, it is the duty of the circuit judge to see to it that the case goes to the jury in a clear and intelligent manner, so that they may have a clear and correct understanding of what it is they are to decide, and he should state to them fully the law applicable to the facts; and especially is this his duty in a criminal case.

5. Where the punishment for an offense is for a term of years, to be fixed by the judge, it should never be made to extend beyond the average period of persons in prison life, which seldom exceeds 25 years.

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Error to Kalamazoo. (Buck, J.) Argued June 27, 1888. Decided October 19, 1888.

Respondent was convicted of carnally knowing and abusing a girl under the age of 14 years, and sentenced to State prison for 50 years. Judgment reversed and new trial ordered. The facts are stated in the opinion.

William N. Cook (*Osborn & Mills*, of counsel), for respondent.

Moses Taggart, Attorney General, and *Frank E. Knappen*, Prosecuting Attorney, for the people.

SHERWOOD, C. J. The respondent in this case was convicted in the Kalamazoo circuit on February 28, 1888, of the crime of carnally knowing and abusing a young girl under the age of 14 years, and was sentenced to imprisonment at Jackson for the term of 50 years.

The evidence shows that the claimed rape was committed in a barn in the township of Brady, in Kalamazoo county, on January 7 last, and that complaint was not made until February 20 following, and then not by any member of the child's family.

It appears from the record that the respondent was a young man about 23 years of age, and addicted to the use of intoxicating liquor to excess; that his parents lived at South Haven, and that he was accustomed to spend the winters at Mrs. Murray's, and had for eight or ten years past; that he had been at Mrs. Murray's about two weeks immediately preceding the commission of the offense charged, and on that day, if the testimony is to be believed on either side, he was so far intoxicated that it is doubtful if he knew what he did.

It further appears that the offense as charged was committed in the day-time, about 2 o'clock in the afternoon; that the girl, though not yet 11 years old, was not seri-

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ously injured, and that she would not even tell her mother of what occurred until she had been threatened with punishment if she did not do so; that at the time the offense was committed the girl was attending school, and that she continued her school the same after as before the assault upon her occurred. And upon her examination she testified when first interrogated that respondent did not hurt her, but subsequently said he did, and her undergarments were stained with blood.

There was no medical examination ever made. The only examination made by any one, as the record shows, was by an aunt of the girl, who, in her testimony, says she found the parts disturbed somewhat inflamed, but the girl did not show anything of the injury in her walk.

It further appears that the respondent is cousin to the girl, and that whenever before he had been in the family he was uniformly kind to the children; and the mother of this girl accounts for his criminal conduct towards the child upon the ground he was so far intoxicated that he did not know what he was doing at the time, and does not believe he would have committed the act if sober.

From all the testimony it is quite apparent that the physical injuries the child received on the occasion were slight, and, if the common-law rules were to be applied, the act shown by the proofs would scarcely reach the grade of the crime charged; and such as it was it seemed not to have excited any great amount of concern or anxiety in the family, as no member thereof made any complaint, and not until the neighbors learned of what had occurred was any action taken in the matter.

Upon the trial the record discloses that the respondent was not very vigorously defended at the circuit. But two exceptions were taken to any rulings in receiving the testimony. Several were, however, made to the charge.

In this Court the whole record has been gone over by

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able counsel upon both sides, and our attention has been earnestly challenged to such errors as have been assigned. All the proceedings had and testimony taken at the circuit are before us. To the general management and conduct of the people's case before the jury, and which are claimed by counsel for the respondent to have been such that no fair trial could be had, objection is now principally made. This view of the case was urged with much vigor and force by respondent's counsel, and a careful review of the whole proceedings has impressed us with the great impropriety and danger of the course pursued.

The case does not show the aggravating circumstances which so frequently accompany criminal conduct of the character charged, and especially is this true when we consider the intoxicated condition of the respondent. While this cannot furnish any legal excuse for what he did, it has an important bearing upon the turpitude of the respondent, and the quality of his crime, and should have had an important influence in determining the extent of the punishment to be inflicted after conviction had. Such considerations, however, seem to have been entirely without weight with the court below, as is very clearly manifest from the extent of the punishment meted out to the respondent.

The first objection taken to the testimony received by the court relates to the conduct of the respondent when the sheriff and his deputy arrested him at South Haven several weeks after the crime was committed. This place was his home. It appears he was in the back yard of a saloon premises at the time, where he claims he had gone to urinate behind some barrels. The prosecution claimed he was there behind the barrels hiding away from the officers, and that when they appeared and asked if his name was Murray he denied it, but, on being asked

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the second time, he said it was Murray, and the officers arrested him, and brought him back to Kalamazoo county. This testimony was objected to. These facts were made prominent before the jury, both upon the trial and in the court's charge, as evidence of guilt.

The respondent denied that he was hiding at the time, and it does not appear that he knew the sheriff or his deputy, or that there was a warrant out for him, or that he was charged with crime; and he always asserted, and his relatives believed, that he knew nothing of the liberties he took with the girl; and the sheriff had not yet informed him of the charge made.

The other exception taken to the testimony offered and received relates to what occurred on the same occasion, and need not be further separately considered. Under the circumstances of this case the admission of this, and the use made of it, was prejudicial to the respondent, and it should not have been received. This disposes of the exceptions taken to the rulings relating to the testimony.

Counsel for respondent, however, insist that our duty does not end here in disposing of these two exceptions to the testimony, but they ask that we shall consider the whole conduct of the trial, the manner the witnesses were examined, the character of the questions put, and their natural tendency to affect the jury prejudicially to the respondent, before we leave this subject; that they have placed all the proceedings had by which the conviction was brought about, and which has resulted in what they claim to be a life sentence, in effect, before us, and ask that we shall say whether or not the prisoner has had that fair and impartial trial guaranteed to him by the law of the land. They ask us to pass upon this question as matter of right under our Constitution and laws, whether objection was made or exception taken or not upon the

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trial; and if the record shall show that the court allowed proceedings so far illegal as to result in depriving the respondent of his liberty, or in the infliction of unusual punishment, that this Court may give relief against such illegal proceedings.

While this Court cannot reverse a judgment or set aside the verdict upon a review of the facts, when such facts have been properly submitted to a jury, and will not ordinarily depart from such rules of practice as have been adopted as the result of the longest experience, yet, under the general superintending power and control over all inferior courts, and their proceedings, given under the appellate jurisdiction of this Court, I have no doubt, in a criminal case, upon a review of all the proceedings had which have resulted in the conviction of a respondent, if the Court can see that a fair trial has not been had, and it is made manifest that injustice has been done, it then becomes the imperative duty of the Court, with or without objections and exceptions by the respondent's counsel, to set aside such proceedings, and order a new trial; and we all think the present presents such a case.

In cases of this character it is with great reluctance that witnesses many times give their testimony, and leading questions have to be put. They should, however, be avoided except when absolutely necessary. It is evident greater latitude was allowed in this case than the rule of safety permits. Many of the questions put to the respondent were improper when he was upon the stand, and were well calculated to arouse the prejudices of the jury towards him, and contained matter highly improper, and which should not have been allowed by the court.

Leaving the testimony and manner of trial, we shall not consider the charge at any great length. We will, however, say that we do not think the charge sufficiently called the attention of the jury to the facts claimed and

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testified to by respondent upon subjects to which the people's testimony had also been given. If any of the testimony is to be especially referred to and narrated to the jury by the court, as given by the people's witnesses, the testimony and explanations relating to the same subject upon the part of the respondent should also be referred to.

Undue prominence is often given to unimportant testimony by the course pursued by the court. Much care should be observed in this regard by the circuit judge. We think this charge has this infirmity. For instance, it says the respondent fled, without stating his testimony upon that subject. Officers were sworn who arrested him, and allowed to give evidence of what was said, but no charge was given of the rule applicable in such cases. The presumptions of the law in favor of respondent were entirely omitted in the charge. The respondent was sworn, and some of his testimony contradicted the people's witnesses; yet no charge was made stating what weight the jury might give to his testimony.

Without any requests from counsel it is the duty of the circuit judge to see to it that the case goes to the jury in a clear and intelligent manner, so that they may have a clear and correct understanding of what it is they are to decide, and he should state to them fully the law applicable to the facts. Especially is this his duty in a criminal case. In this case it was not so done. Too much reliance is often placed upon counsel by the court in this respect for requests; but this should not be done. The court must do its duty in a criminal case, whether counsel do so or not. It is to the court that the accused has a right to look to see that he has a fair trial.

There is another feature of this case to which we wish to call special attention, and that relates to the sentence imposed. It is for 50 years, and will very likely reach

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beyond the natural life of the respondent, unrestrained of his liberty, and overreach by 10 or 15 years his natural life if so restrained. We see nothing in this record warranting any such sentence, and it must be regarded as excessive. It will not do to say the executive may apply the remedy in such a case. We do not know what the executive may do, and it is but a poor commentary upon the judiciary when it becomes necessary for the executive to regulate the humanity of the bench.

But the Constitution has not left the liberty of the citizen of any state entirely to the indiscretion or caprice of its judiciary, but enjoins upon all that unusual punishments shall not be inflicted. Where the punishment for an offense is for a term of years, to be fixed by the judge, it should never be made to extend beyond the average period of persons in prison life, which seldom exceeds 25 years.

We are all of opinion that the present case shows an abuse of the discretion vested by the statute in the circuit judge in this respect.

The judgment must be reversed, and a new trial granted.

The prisoner, in the mean time, will be let to bail, in the sum of $1,000, with two good and sufficient sureties, to be approved by the circuit judge.

MORSE, CAMPBELL, and LONG, JJ., concurred. CHAMPLIN, J., concurred in the result.

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GEORGE N. FLETCHER ET AL. v. THE TOWNSHIP OF ALCONA.

Taxes—Assessment of standing timber—Real estate.

1. The ownership of standing, growing timber is an interest in the land itself, and assessable as realty. Cooley, Tax'n (2d ed.), 366–368; *People v. Commissioners*, 82 N. Y. 462.
2. Standing, growing trees are not "forest products," within the meaning of section 11, subd. 4, of the tax law of 1885.
3. Standing timber, reserved on a sale and conveyance of land, is not assessable as personal property, but the land should be assessed at its true cash value, which should include said timber.

Error to Alcona. (Tuttle, J.) Argued June 28, 1888. Decided October 19, 1888.

Assumpsit for taxes paid under protest. Defendant brings error. Affirmed. The facts are fully stated in the opinion.

W. E. Depew, for appellant.

Frank Emerick, for plaintiffs.

[The points of counsel are fully stated in the opinion. —REPORTER.]

LONG, J. The plaintiffs are copartners, carrying on the lumbering and saw-milling business at Alpena, under the firm name of Fletcher, Pack & Co. Prior to November 7, 1885, they had owned for a number of years lands situate in townships 28 N., of range 6 E., and 28 N., of range 7 E., in the county of Alcona, Mich., and township 29 N., of range 2 E., Montmorency county, Mich. On that date, in pursuance of previous negotiations, they

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deeded the lands in said townships to the firm of Snow & Huber, of Marion county, Iowa.

The lands lying in Alcona county comprised 28 distinct government 40's, containing about 1,120 acres, and were wild and unoccupied. This deed reserved to Fletcher, Pack & Co. all the pine timber then standing on these lands. It was recorded in the office of the register of deeds of Alcona county, March 20, 1886, and the supervisor had constructive and actual notice of the deed and its recording from plats and abstracts furnished him by the register of deeds at the time he made his assessment roll for 1886.

Three parcels of this land were assessed by the supervisor to Fletcher, Pack & Co., and the remainder to Snow & Huber. The taxes upon these three parcels amounted to $189.19. The supervisor also assessed to Fletcher, Pack & Co. the pine timber standing upon the lands deeded to Snow & Huber, at a valuation of $25,280. It was assessed as personal property, and upon the part of the roll devoted entirely to the assessment of personal property, and separate from any assessment of real property. The assessment of real and personal property were made upon different parts of the roll, and were kept entirely separate. The amount of the tax levied upon this assessment was $797.61.

The plaintiffs declined to pay these two items assessed to them, viz., the sum of $189.19, assessed upon three parcels of land included in the deed to Snow & Huber; also the sum of $797.61, levied upon the pine timber reserved by them in said deed.

On January 31, 1887, the treasurer of the defendant, with the tax-roll of the township and his warrant thereto attached in his possession, seized by virtue thereof a locomotive and train loaded with logs, to satisfy this among other taxes assessed against the plaintiffs for the year

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1886. To procure the release of this property the plaintiffs paid the tax under protest. This action was brought to recover from the township the amount of taxes so paid.

On the trial the right of the plaintiffs to recover the sum assessed upon the three parcels deeded to Snow & Huber, upon the ground they were not owned or occupied by the plaintiffs at the time of the assessment, was not controverted by counsel of defendant, and it is not controverted here.

As to the taxes levied upon the assessment of $25,280 upon the pine timber reserved by plaintiffs, as personal property, the ground of plaintiffs' claim to recover taken upon the trial was that that sum was a fraudulent overvaluation of this timber, and considerable evidence was taken tending to show this fact. It was shown that for a number of years prior to 1886, and while Fletcher, Pack & Co. owned these lands, and also the same pine timber standing thereon, the highest aggregate assessment of all these lands was about $11,000. But after this deed was made the land itself was assessed as real estate, and the pine timber standing thereon was assessed to the amount of $25,280 as personalty. This part of the case becomes entirely unimportant under the ruling of the court upon another claim made by the plaintiffs in relation to the assessment of this timber. Plaintiffs' claim was that, as personalty, this timber was not assessable in Alcona township at all.

It is undisputed that plaintiffs were copartners carrying on a large lumbering and saw-milling business at Alpena; that their business was principally carried on there; that they had their headquarters there; and that two of the partners resided there, the other residing in Detroit. It was also shown and was undisputed that at the time the assessment was made for the year in question,

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to wit, on the second Monday of April, this firm did not hire or occupy any store, mill, office, or any of the places of business or use in this township, required by section 11 of the tax law of 1885, to legalize the assessment of personal property in the township other than where the person resides, or a firm has its principal place of business.

Defendant's counsel, admitting these facts, and the legal conclusion therefrom that, under the tax law, this timber could not be assessed to plaintiffs under the general rule in reference to personal property, claims that this timber was a forest product, and comes within the fourth subdivision of section 11 of said act, and was assessed properly in said township of Alcona. The court held this standing timber was not a forest product, and further held, the facts being undisputed, that plaintiffs were also entitled to recover the amount of this tax.

Judgment and verdict passed for the plaintiffs for the amount of the tax, and the defendant brings the case to this Court on writ of error.

The reservation contained in the deed from Fletcher, Pack & Co. to Snow & Huber is as follows:

"Reserving all pine and hemlock timber and the right of way to remove the same, and the exclusive use of all landings on streams, flowage for dams, timbers for building log road, camps, skidways, and logging railroad, across said land."

The tax law of 1885 (Act No. 153, Laws of 1885) provides:

"SECTION 1. That all property within the jurisdiction of this State, not expressly exempted, shall be subject to taxation.

"SEC. 2. For the purpose of taxation, real property shall include all lands within the State, and all buildings and fixtures thereon, and appurtenances thereto, except in cases otherwise expressly provided by law; personal prop-

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erty shall include all goods and chattels within the State, all ships, boats," etc.

Section 5 provides:

"A copartnership shall be deemed to reside in the township where its business is principally carried on"; and that "copartnership shall be treated as an individual, and whenever the name of the owner or occupant of property is required to be entered upon the assessment roll, * * * the firm name shall be used."

Section 6 provides:

"Real property shall be assessed in the place where situated, and to the owner, if known; if not, then to the occupant, if any; and, if there be no occupant, then as 'unknown.'"

Section 10 provides:

"All personal property, except as hereinafter provided, shall be assessed to the owner in the township of which he is an inhabitant, on the second Monday of April of the year for which the assessment is made."

Of the excepted case subdivision 4 of section 11 provides:

"Personal property of non-residents of the State, and all forest products owned by residents or non-residents, shall be assessed to the owner or to the person having control thereof in the township or ward where the same may be, except that, where such property is in transit to some place within the State, it shall be assessed in such place," etc.

It is insisted upon the argument here by counsel for the plaintiffs that under our statute this timber should have been assessed as real property.

The tax could not legally be assessed to the plaintiffs as personalty in the township of Alcona. The firm is composed of three partners, two of whom reside in Alpena, and one in the city of Detroit, and not in the township or county of Alcona. Their principal place of business is at Alpena; and section 5 of the act provides that, for the

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purpose of assessing property and collecting taxes, a copartnership shall be treated as an individual, and shall be deemed to reside in the township where its business is principally carried on.

Section 10 fixes the place of assessment and collection of personal taxes as in the township of which the owner is an inhabitant, on the second Monday of April of the year for which the assessment is made, except in certain cases specified in the act. This class of property does not come within the excepted cases. It cannot be treated as "forest products," and brought within subdivision 4 of section 11. The property is standing, growing trees. It is not severed. The exceptions in subdivision 4 of section 11 were meant to and do include such property as logs, lumber, timber, poles, ties, etc., produced from the forest, and not these things while standing and growing on the land. There is no authority under the tax law to assess this class of property as personal. It is a part of the realty, and should be assessed as such.

Section 2 of the act above quoted provides:

"For the purpose of taxation, real property shall include all lands within the State, and all buildings and fixtures thereon, and appurtenances thereto, except in cases otherwise expressly provided by law."

It cannot affect the question that the title in fee to the land is in one person, and the buildings or other fixtures and appurtenances are in another. These buildings, fixtures, and appurtenances are a part and parcel of the realty. The ownership of timber standing and growing on land is an interest in the land itself, and, under this statute, assessable as realty. Cooley, Tax'n (2d ed.), 366–368; *People v. Commissioners*, 82 N. Y. 462.

This assessment was placed on a part of the roll devoted entirely to the assessment of personal property, and separate from any assessment of real property. This timber,

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standing and growing upon these lands, for the purposes of assessment and collection of taxes, was real property, and no valid charge could be created against the plaintiffs or lien acquired specifically upon the property by assessing it as personal.

The methods provided by our system of tax laws for the assessment of property and collection of taxes upon real and personal property are very different. In the assessment of real property the owner is entitled to a specific description of the property, and an assessment by distinct parcels and separate valuations. In making such assessment, it is the duty of the supervisor to estimate the true cash value of every parcel of real estate, and it is only where two or more parcels are used and occupied together that they may be assessed by one valuation. And, in assessing, the statute requires it to be described either as a government subdivision, a lot or block, or by its boundaries, and each description to show the number of acres it contains, and the taxes are made a lien upon the property. The tax-payer is given, by the statute, the privilege of paying upon any one parcel, and when the lands are returned for non-payment of taxes the tax-payer may pay upon any parcel returned, and if the lands are sold for the taxes, may redeem any parcel.

Here one valuation is placed upon this property, by the supervisor, of $2,280 as personalty. The property assessed is in fact a part of the realty. This realty is severed in location by long distances. The tax cannot be upheld. These lands should be assessed in parcels at their true cash value to the owner or occupant, and there should be included in such values all the buildings and fixtures and timber thereon, and appurtenances thereto. The tax is on the land, and includes the whole estate. If the land is sold for the tax, the deed conveys the land therein

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described, and is *prima facie* evidence of title in the purchaser.

The fact that the court gave a wrong reason for holding the tax invalid cannot aid the defendant. The tax was illegally assessed, and plaintiffs, having paid it under protest, have a right to recover it back.

The judgment of the court below must be affirmed, with costs.

The other Justices concurred.

DARIUS N. AVERY, EXECUTOR, ETC., v. HARRY F. DEWITT.

Taxes—Assessment—Personal property of deceased persons—Forest products.

1. Prior to notice of distribution, logs and lumber, belonging to the estate of a deceased person, in the hands of the executor, are assessable to such executor in the town in which the deceased last dwelt.

   So *held*, where the last place of residence of the deceased was in the city of Detroit, and the lumber was piled upon a dock in the village of Lakeside, Muskegon county, Michigan, and the logs were in a boom in said village awaiting manufacture, in which village the property was assessed.

2. The intent of the Legislature, in framing the tax law of 1885, was that all forest products should be assessed where the same may be, except that, where such property is in transit to some place within the State, it shall be assessed at such place, and that all goods and chattels situate in some township other than where the owner resides shall be assessed in the town where situate, if the owner or person having control thereof hires or occupies a store, shop, mill, dock-yard, etc., for use in connection with such goods and chattels, excepting, however, that personal property belonging to the estates of deceased persons, in the hands of executors and administrators, shall be assessed

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to them in the town where the deceased last dwelt, until they shall give notice that the estate has been distributed to the parties interested.

Error to Muskegon. (Dickerman, J.) Submitted on briefs June 29, 1888. Decided October 19, 1888.

Replevin. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Smith, Nims, Hoyt & Erwin, for appellant.

J. E. Sullivan (F. W. Cook, of counsel), for defendant.

[The points of counsel are fully stated in the opinion.—REPORTER.]

LONG, J. This is an action of replevin for a quantity of lumber, brought in the circuit court for the county of Muskegon.

The defendant was the marshal of the village of Lakeside, in the county of Muskegon, and had the tax roll of said village, with the proper warrant annexed thereto, for the collection of taxes in said village for the year 1887. After demand and refusal of the taxes assessed upon said roll against the plaintiff for a personal tax, he, by virtue of said tax roll, seized the property in controversy in this case to satisfy the same.

The plaintiff is the executor of the last will and testament of George Fuller, deceased, whose last place of residence was in the city of Detroit, this State. George Fuller's estate had not yet been distributed at the time of the assessment, and no notice had ever been given that the estate had been distributed to the parties interested. The plaintiff also resided in the city of Detroit.

The property assessed was personal, and consisted in part of logs lying in the boom of A. S. Montgomery &

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Co., in said village, to be manufactured on a contract with A. S. Montgomery & Co., and the remainder, of lumber piled upon the dock of A. S. Montgomery & Co. in said village. All the property was situated in the village of Lakeside at the time the assessment was made, which was in the time required by law, and none of the property was in transit.

All the proceedings for the assessment of the property and the levy of the tax were regular, and in due form of law.

The property was assessed at the sum of $38,000, by the assessing officer, against the plaintiff.

The plaintiff appeared before the board of review, and was heard upon the question of the assessment. The record of the board of review shows the following proceedings:

"D. N. Avery appeared, and made statement that he owned no property liable to assessment in the village of Lakeside, but that he was the executor of the estate of George Fuller, deceased, to whom said property belonged. Said property was reduced from $38,000 to $19,750."

The change upon the assessment roll from Avery, D. N., to Avery, D. N., executor of the estate of George Fuller, deceased, was made upon the statement of Avery that if the property was assessable at Lakeside, which he denied, it should be assessed against him as the executor of the estate of George Fuller, deceased, and he asked that such change be made, and it was so made, and the amount reduced to $19,750.

The tax sought to be collected, including marshal's fees of 4 per cent., amounted to $328.08, and at the close of the trial, under the direction of the court, the jury returned a verdict against plaintiff for that sum. Judgment was thereupon entered in favor of defendant.

Plaintiff brings the case to this Court by writ of error.

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The plaintiff's claim is that the village had no jurisdiction to make the assessment, but that the same is controlled by section 10, and subdivision six of section 11, of the tax law of 1885.

The defendant's claim is that it is controlled by section 10, and subdivision one of section 11, of the tax law of 1885 (Act No. 153, Laws of 1885). Section 10 reads:

"All personal property, except as hereinafter provided, shall be assessed to the owner in the township of which he is an inhabitant, on the second Monday of April of the year for which the assessment is made."

Section 11 reads:

"The excepted cases referred to in the preceding section are as follows, viz.:

"1. All goods and chattels situate in some township other than where the owner resides shall be assessed in the town where situate, and not elsewhere, if the owner or person having control thereof hires or occupies a store, mill, dock-yard, piling ground, place for sale of property, shop, office, mine, farm, storage, manufactory, or warehouse therein, for use in connection, with such goods and chattels: *Provided*, That the procuring any such property to be manufactured upon contract shall be deemed to hire a mill or manufactory within the meaning of this section."

"4. Personal property of non-residents of the State, and all forest products owned by residents or non-residents, shall be assessed to the owner or to the person having control thereof in the township or ward where the same may be, except that, where such property is in transit to some place within the State, it shall be assessed in such place: *Provided*, all forest products in transit on the second Monday of April, and thereafter found in the waters or streams of this State, shall be held to have a place of destination at the sorting grounds of the rafting and driving agents or booming company nearest the mouth of such stream, unless the contrary shall be made to appear by the owner or party having the same in charge. *Provided, further*, That all lumber, logs, timber, * * * that may be piled or left in any yard, * * * shall not be deemed in transit, but shall be assessed to the owner thereof in the township or ward where the same

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may be situate at the time provided for by law for taking any assessment."

"6. The personal property belonging to the estates of deceased persons, in the hands of executors or administrators, shall be assessed to them in the town where the deceased last dwelt, until they shall give notice that the estate has been distributed to the parties interested. If such deceased was a non-resident of the State, such property shall be assessed in the town where situated, to such executors, administrators, or to the person in possession."

Subdivision six of section 11 above cited stood as subdivision seven of section 8 in the tax law of 1838 in substantially the same form, and has been continued in the tax laws of this State through all of their changes and modifications since that time, and has several times been construed by this Court. As it stood in 1838 it read:

"SEC. 8. The excepted cases mentioned in the preceding section are the following, viz.:

"*Seventh*, The personal estate of deceased persons which shall be in the hands of their executors or administrators, and not distributed, shall be assessed to the executors and administrators in the township where the deceased person last dwelt, until they shall give notice to the assessors that the estate has been distributed and paid over to the parties interested therein."

And the only material addition or change that has been made to such subdivision is found in the act of 1885, above cited, which reads:

"If such deceased was a non-resident of the State, such property shall be assessed in the town where situated, to such executors, administrators, or to the person in possession."

At the time this change was made in subdivision six of section 11, and by the same act, the first subdivision of the same section was also changed to read as above cited.

As subdivision one stood prior to that time, it provided substantially that—

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"All goods, wares, and merchandise, or any stock in trade, including stock employed in the business of the mechanic arts, in townships within the State other than where the owners reside, shall be taxed in those townships, if the owners hire or occupy stores, mills, shops, or warehouses therein, and shall not be taxable where the owners reside."

Subdivision four is substantially a new provision introduced into the tax law by the act of 1885.

It is contended by counsel for defendant that subdivision six is repealed by necessary implication by the amendment of subdivision four in the act of 1885, so far as this class of property is concerned, viz., forest products.

We cannot accede to this view. There is no good reason why all these subdivisions cannot stand, and we think it was the intent of the Legislature, in framing the act of 1885, that all forest products should be assessed where the same may be, except that, where such property is in transit to some place within the State, it shall be assessed in such place, and that all goods and chattels situate in some township other than where the owner resides shall be assessed in the town where situate, and not elsewhere, if the owner or person having control thereof hires or occupies a store, shop, mill, dock-yard, etc., for use in connection with such goods and chattels, excepting, however, that personal property belonging to the estate of deceased persons, in the hands of executors and administrators, shall be assessed to them in the town where the deceased last dwelt, until they shall give notice that the estate has been distributed to the parties interested.

Some changes were made in these subdivisions by Act No. 254, Laws of 1887. This act took effect on September 25, 1887, and cannot affect the controversy here. But the Legislature again amended subdivision six by Act 254 to read:

"The personal property belonging to the estates of

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deceased persons, in the hands of executors and administrators, shall be assessed to them in the town *and in the school-district* where the deceased last dwelt, until they shall give notice that the estate has been distributed to the parties interested."

This clearly shows, however, that the Legislature thought the law of 1885 did not subject personal estates of deceased persons to be assessed other than as provided in subdivision six, § 11, of the law of 1885.

In *Herrick v. City of Big Rapids*, 53 Mich. 555 (19 N. W. Rep. 182), the question was whether it was competent to assess a legatee for a legacy not yet due, and still in the hands of the executors; and this Court said:

"Under our statutes the property of a testate estate is required to be assessed at the last residence of the decedent, to the executors. * * * The statute is express that the whole undistributed estate shall be assessed to the executors."

The same doctrine was also held in *Barstow v. City of Big Rapids*, 56 Mich. 35 (22 N. W. Rep. 103).

In *Hardy v. Inhabitants, etc.*, 6 Allen, 281, the court, speaking of a similar statute in Massachusetts, says:

"The personal estate of deceased persons shall be assessed in the town where the deceased person last dwelt, until the executors shall give notice to the assessors that the estate has been distributed and paid over to the parties interested therein."

Counsel for plaintiff raise another question in their brief, and insist that it must be conclusive of this case, viz.: Is property held by an executor, as in this case, if otherwise correctly assessed, his (the executor's) property, within the meaning of those sections of the statute? And, if not, can it be levied upon and sold by the officer? Should not the officer have charge and control of the tax roll and warrant for the collection of the tax make his demand in probate court, the same as any other creditor against the estate?

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We need not consider or discuss this question. From the view we take of the case, under the facts admitted, the property was not assessable in the village of Lakeside, and the officer had no right to levy upon or take into his possession the property in controversy. It was only assessable in the town where the deceased last dwelt, and from the conceded facts this was in the city of Detroit. It follows that the judgment of the court below must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

JOHN M. DONALDSON AND HENRY J. MEIER v. THE DETROIT MUSEUM OF ART.

Contracts—Competitive designs for building—Award.

Defendant issued a circular inviting designs for the first section of a public art gallery which it proposed to erect, giving a full description of the grounds and proposed building, and character of the designs it desired submitted, which were to be passed upon by a competent board of experts, and the author of the one accepted was to be employed to complete a set of plans, with details, at the usual rate of compensation, of the American Architects' Association, and specified prizes were to be awarded for the two designs deemed next highest in merit, but the board was not to be obliged to make any award if none of the designs were deemed worthy. Plaintiffs submitted a design, which was not deemed meritorious by the board, and was not accepted by defendant, and brought suit for their services in preparing it, and the Court hold that upon the undisputed facts they cannot recover.

Error to Wayne. (Reilly, J.) Argued May 22, 1888. Decided October 19, 1888.

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Assumpsit. Plaintiffs bring error. Affirmed. The facts are stated in the opinion.

James H. Brewster, for appellants, contended:

1. Defendant's proposal, as set forth in its circular, when accepted and acted upon by plaintiffs, became a unilateral contract, as in the case of an offer of a reward, acted upon by informer or finder; citing *Pierson v. Morch*, 82 N. Y. 503; *Williams v. Carwardine*, 4 Barn. & Adolp. 621; *Lancaster v. Walsh*, 4 Mees. & W. 16; and it was not necessary to the validity of the contract that mutuality should exist from the first; citing Bishop, Cont. (1887) § 87; Hare, Cont. chap. 15, "Unilateral Contracts."
2. Under this contract the designs were to be submitted to a *competent* board of experts, whose opinion was to be conclusive; citing *Saverood v. Farwell*, 17 Mich. 308; which opinion should be preceded by discussion and interchange of views and could not be formed from the *separate* opinion of each member; citing *Rex v. Inhabitants of Marlow*, 2 East, 244, 248, 249; *Battye v. Grefley*, 8 Id. 319, 327; *McCortle v. Bates*, 29 Ohio St. 419, 422; *Leonard v. Darlington*, 6 Cal. 123; *Hascall v. University*, 8 Barb. 174, 182.
3. The board of experts should meet by itself, not with defendant's trustees; citing *Cammeyer v. United Churches*, 2 Sandf. Ch. (N. Y.) 187, 228, 229.
4. The universal rule, as to arbitration by several, is that (whether or not a majority may make an award) all must meet, and together consider the subject; citing *Ackley v. Finch*, 7 Cow. 290, 293; *Yates v. Russell*, 17 Johns. 461, 469; *Short v. Pratt*, 6 Mass. 496; *Maynard v. Frederick*, 7 Cush. 251; How. Stat. § 8480; and, unless the statute or submission otherwise provides, the general rule requires all the arbitrators to join in the award; citing Morse, Arb. & Awd. 162; *Stose v. Heissler*, 120 Ill. 433 (11 N. E. Rep. 161); *Sherman v. Cobb*, 10 Atl. Rep. 59; *Oakley v. Anderson*, 93 N. C. 108.
5. In construing contracts the intention of the parties is to be deduced from the language employed; citing *Plano Mfg. Co. v. Ellis*, 68 Mich. 101; Bishop, Cont. (1887) §§ 380, 381; and the words are to be taken in their strict sense against the party using them, where one party makes the writing; citing Id. § 414; and the best construction is secured by viewing the subject-matter as the mass of mankind would view it, for it may be safely assumed that such was the aspect in which the parties viewed it; citing *Nav. Co. v. Moore*, 2 Whart. 477, 491.

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6. Where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee; citing *Hoffman v. Ins. Co.*, 32 N. Y. 405, 413; *Ins. Co. v. Mund*, 102 Penn. St. 89, 94; *Potter v. Berthelet*, 20 Fed. Rep. 240.

7. Courts are always reluctant to give a construction to a contract or a law that shall constitute a person a judge in his own case; citing *Janvrin v. Exeter*, 48 N. H. 83, 85.

8. A breach of the contract is disclosed, in that the defendant's trustees kept the design about a month, and then asked the advice of three experts as to awarding the second and third prizes, who did not meet as a board, and only one gave a positive opinion, and the trustees themselves awarded the first premium, of which none of the experts approved, and the author of which had not fulfilled the conditions imposed upon him by the notice, and it does not appear that they awarded the second premium in accordance with the advice of the experts.

9. Plaintiffs are certainly entitled to the cost of preparing designs as requested by defendant.

10. Where there has been a refusal to submit to an agreed arbitration, the party aggrieved may recover his costs and expenses of the party so refusing; citing *Pond v. Harris*, 113 Mass. 114, 121; *Blaisdell v. Blaisdell*, 14 N. H 78, 81; *Miller v. Canal Co.*, 53 Barb. 590; *Day v. Bank*, 13 Vt. 97; *Hawley v. Hodge*, 7 Id. 237, and the same principle is applied in *Bulkley v. U. S.*, 19 Wall. 37, 49.

11. The question of the performance of a contract is for the jury; citing *Jaquith v. Hudson*, 5 Mich. 123, 132; *Phelps v. Whitaker*, 37 Id. 72, 78; *McKay v. Evans*, 48 Id. 597, 602.

12. The meaning of the contract is for the court, but the jury must determine whether the necessary acts have been done; citing *Medical Institution v. Harding*, 11 Cush. 285; *Stecker v. Smith*, 46 Mich. 14; *Chamberlain v. Jackson*, 44 Id. 320; *McMullen v. MacKenzie*, 2 G. Greene (Iowa), 369.

13. The question of reasonable time, put in issue by the pleadings, was for the jury; citing *Haywood v. Harmon*, 17 Ill. 480; *Henkle v. Smith*, 21 Id. 241.

Dickinson, Thurber & Stevenson, for defendant, contended for the conclusions stated in the opinion, citing no authorities.

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SHERWOOD, C. J. The defendant is a corporation in Detroit, whose affairs are managed by a board of eight trustees.

The plaintiffs are architects, and bring suit to recover the value of their services in preparing plans and designs, to compete for certain premiums offered, as claimed by defendant, with a view to securing suitable plans for the erection of a building to be used by it as an art museum.

The declaration contains a special count in *assumpsit*, and was accompanied with the following bill of items of the plaintiffs' demand, viz.:

"The following is a bill of particulars of the plaintiffs' demand in this cause, and for the recovery of which this action is brought, to wit:

"1. Services by the plaintiffs as architects from November 20, 1886, to February 1, 1887, in preparing for the defendant, and at its request, preliminary studies and estimates of a proposed building, namely, a section of a proposed art gallery, $400.

"2. Professional services as architects rendered by the plaintiffs from November 20, 1886, to February 1, 1887, to the defendant, at the defendant's request, in accordance with a certain circular or notice of the defendant, dated November 20, 1886, in preparing designs in accordance with the terms of said notice or circular, for the building proposed by the defendant to be erected at the proposed cost of $40,000; preparing and submitting description of the same; procuring and submitting estimate of cost from a responsible party; materials used in preparing said designs,—one per cent. of the cost of the proposed building for which said designs were prepared, viz., $400.

The defendant pleaded the general issue, and the cause was tried in the Wayne circuit before a jury, and a verdict was directed for the defendant by the circuit judge. The plaintiffs ask for a review of the case in this Court.

From the record it appears the defendant's secretary prepared a circular notice, giving the location of the site for the building it proposed to erect, and a general

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description of the building desired, and inviting architects to submit designs for such building. The circular proposed by the secretary was approved by a majority of the trustees of the defendant corporation, and the secretary was authorized by them to send the circular to architects applying for it.

The notice contains the following statements, clauses, and provisions:

"DETROIT MUSEUM OF ART.

"NOTICE TO ARCHITECTS.

"The trustees of the Detroit Museum of Art purpose the immediate erection of the first section of a public art gallery, and hereby invite designs for the same."

The next four paragraphs of the circular describe with great particularity the lot selected as the site for the building, and the streets upon which it fronts, and its size, in what direction it lies from the center of the city, and the distance of the line of houses on the adjoining property from Jefferson avenue, and state that it is desirable to conform to the same. The circular then proceeds:

"THE BUILDING.

"The amount of the appropriation for the building now to be erected is $40,000. It is desired to have it occupy the Jefferson avenue frontage, due regard being had to preserving proper space between it and any present or future buildings on the adjoining lot, but without unnecessary waste of ground. Approximately the building will be 90 to 100 feet long, and 40 to 50 feet wide. The building is to consist of a cellar, ground floor, and second story, the latter to be lighted by skylights alone, for purposes of picture galleries. The ground floor will contain the vestibule, hall for casts and statuary, an office for the secretary, and the necessary retiring rooms. The building will be of fire-proof construction. The walls will be of Philadelphia pressed brick, with stone or terra-cotta dressings, or may be altogether of stone. Preference will be given to dignified simplicity and purity of style rather than too elaborate ornamentation and novelty

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of design. As the lot will ultimately be covered with buildings, the south or rear side of this structure may be absolutely plain.

"THE DESIGNS.

"The drawings to be submitted in competition will be sketches only, and will consist of the following: Plan of each floor, $\frac{1}{4}$ inch scale. One sectional drawing, $\frac{1}{8}$ inch scale. Front and one side elevation, $\frac{1}{8}$ inch scale. Ground plan of the lot suggesting future extensions, $\frac{1}{16}$ inch scale. Drawings to be in ink; no brush work or color to be used, but stone trimmings, if any, to be shown by etching. They will be submitted by motto, and will be passed on by a competent board of experts. Every design must be accompanied by a description of the same, and also by an estimate of cost from a responsible party. The designs will be publicly exhibited, and those receiving premiums will remain the property of the museum. All designs must be submitted before February 1, 1887. The examining board will not be bound to make any award, if none of the designs shall be deemed worthy.

"PREMIUMS.

"The author of the accepted design will be employed to complete a full set of plans, with details, at the usual rate of compensation of the American Architects' Association. Two additional prizes, of $300 and $200 respectively will be awarded for the two designs deemed next highest in merit. For any additional particulars, address,

"COLLINS B. HUBBARD, Secretary,
"48 Moffat Building, Detroit, Mich.

"*Detroit, Mich. Nov.* 20, 1886."

It appears from the record that the plaintiffs, in the fall of 1886, received from the defendant a circular same as the foregoing, and, relying upon the propositions therein contained, prepared a set of competitive plans called "Preliminary Sketches," in accordance with the terms of the circular, and submitted them to the defendant, and designated them by the motto, "*Lampas Veritatis.*" They were accompanied with an estimate of cost, and were so submitted within the period named in the circular. It appears there were about 50 other competitors for the prizes offered.

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The trustees, as is shown by the record, selected four persons to act as a committee, to examine plans submitted for the proposed building, for the purpose of awarding the first, second, and third prizes. The persons thus selected, and who acted and made reports, were Gordon W. Lloyd, E. E. Myers, and Mortimer L. Smith, of Detroit, and Prof. H. S. Frieze, of Ann Arbor. It further appears from the testimony that all of these gentlemen examined all the plans submitted, to the number of fifty-three, and that of the plaintiffs was among those examined, and they considered its merits as compared with the others, and but one of the experts reported in favor of the plan submitted by the plaintiffs. The others all rejected it.

The committee of experts, or board as they are termed in the circular, did not all meet together when the plans were examined (several of them did, however, examine them together); nor was there any report made of their examination in which all united, but each made his separate report, and the three parties presenting plans which severally received the recommendation of all or a majority of the experts as the most meritorious were awarded the prizes offered in the circular, and which were accordingly paid by the trustees. These facts are substantially undisputed.

The contract to erect the building was let to James Balfour of Hamilton, Ontario, who received the first prize for his plan.

The defendant insists that it substantially complied with the proposition contained in the circular, and in good faith paid over the money for prizes to those presenting the three most meritorious plans as ascertained by the board of experts.

The circuit judge took the defendant's view of the case, and directed the verdict accordingly.

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The plaintiffs claim that the trustees ignored the opinions of the experts, and decided the whole matter for themselves; that the defendant did not, within a reasonable time after the designs of the plaintiffs were submitted to it, procure them to be passed upon by a competent board of experts, according to the intent and meaning of the circular; that the opinion of the experts should have been the opinion of the board, and the report should have been one made by the board, and not the several opinions of the individual experts; that the matter to be submitted to them was to be passed upon by the experts, as a board; that the experts should have consulted together, and an interchange of views should have been obtained, before any final conclusion was reached or report made; and that such is the proper construction of the circular, and what was in the minds of the trustees when the same was formulated.

I do not think that either of the positions of the plaintiffs' counsel can be maintained. The drawings to be placed in competition were to be passed upon by a board of experts. There was no promise contained in the circular that the trustees would accept any one of them, even if found meritorious by the trustees; but if one was accepted the author was to be employed by the defendant to complete a full set of plans, with details, with rate of compensation therefor established by the American Architects' Association. One of them was accepted, and the next two most meritorious, as found by the experts, were paid the premiums promised.

The experts were not to determine the kind or character of the building the trustees were to erect, but to present plans of such as were thought worthy to be erected by persons who had knowledge and experience in building and planning buildings. The object of the trustees was to secure the best plan, and they took this

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course to get before them the result of the largest experience among architects upon this subject, and they offered the prizes mentioned in the notice for the purpose of securing the greatest number from men of the largest experience, and that they might be properly advised upon the subject they promised in the circular that they would submit such plans to architects, and take their judgment upon the plans presented.

The number of architects, whose judgment they should so take, was not mentioned; they were, however, to be selected by themselves, and how and in what manner the examination of the plans presented was to be made by them, or how or in what manner the architects should make their determination, was not mentioned in the circular. Whether they should make such examination separately, or together, was at the discretion of the trustees. There may have been reasons why the trustees should want a separate examination and report. Certainly the competitors cannot find fault in this regard if the architects were competent, and this is conceded so far as three of them are concerned; and in relation to the fourth it was for the plaintiffs to show it, if he was not competent, under the circumstances of this case.

The trustees had a right, after taking the opinion of these experts, to ignore their action and conclusions, and erect such a building as they chose. They could not, however, if the experts deemed three of the plans presented by the competitors meritorious, avoid the payment of the prizes offered. There may be some doubt whether the reports made can be said to show any three of the plans meritorious. I do not care, however, now to discuss that point, as it is not made in the case by counsel.

The view I have taken of the case renders it unnecessary to consider the question of reasonable time in submitting the plans of the competitors to the experts. If the

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plaintiffs' plan was not regarded as meritorious by them, it is entirely immaterial when it was submitted. The experts did not act as arbitrators. They were not called upon to pass upon the rights of parties, but simply upon the comparative merits of several plans for the defendant's building. The plaintiffs had nothing to do with their appointment or with their number. The law pertaining to arbitration has no application to their mode of proceeding, or to the action taken by them.

Upon no view that I have been able to take of the case on the facts undisputed were the plaintiffs entitled to recover, and the circuit judge committed no error in so ruling.

The judgment will be affirmed.

The other Justices concurred.

MARY HOWES v. MOSES S. DOWNING.

Bill for specific performance of contract — Payment — Finding of court.

This case involves a question of fact *purely*, and the conclusion of the circuit judge is adopted as correct, and his decree affirmed.

Appeal from Saginaw. (Gage, J.) Argued October 4, 1888. Decided October 19, 1888.

Bill for specific performance of contract. Complainant appeals. Decree affirmed. The facts are stated in the opinion.

Wilber & Brucker, for complainant.

Samuel J. Platt, for defendant.

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[The briefs of counsel are confined to a discussion of the testimony.—REPORTER.]

MORSE, J. The complainant filed her bill in the circuit court for the county of Saginaw, in chancery, for the specific performance of a contract between herself and the defendant, dated November 23, 1882, for the purchase by her of two lots in Emerson's addition to East Saginaw.

The only controversy between the parties was in regard to the payment of $50. Complainant made her payments upon the contract through her husband, William Howes, and the payments were received by H. P. Smith as agent for the defendant.

The contract was executed in duplicate. All the payments were indorsed upon both duplicates, excepting the disputed payment of $50, and the last payment, which was a tender by complainant of the amount claimed by her to be due.

The complainant claimed that her husband paid Smith $50 upon the delivery of the contract to him, of date November 23, 1882, which payment was not indorsed, and that on December 5, 1882, another $50 was paid and indorsed.

The defendant claimed that the contract was not delivered until the latter date, and that the payment then made was the first payment upon the contract.

The circuit judge found the defendant's version to be the correct one, and entered a decree that upon payment to him by the complainant of $64.15, balance found due upon the contract, and interest from the date of the decree, the defendants should convey the lots to her. Costs were also awarded against complainant.

We have carefully examined the evidence, and are satisfied that the circuit judge came to the right conclusion in the premises. We do not think it necessary to set

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out our reasons for this determination, as such reasons would not be of general interest. The question involved is purely one of fact, and we must believe that the husband of complainant is mistaken in his assertion that he made the disputed payment.

The decree is affirmed, with costs.

The other Justices concurred.

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CALIXTE D. BERNIER ET AL. v. ALFRED BERNIER ET AL.

Equity practice—Answer—Want of signature and verification—Revised statutes of the United States—Homestead laws—Uncompleted entry—Rights of minor children.

1. The lack of the signature of the defendant to his answer is a fatal defect on motion to strike from the files, if not waived by replication. *Kimball v. Ward*, Walk. Ch. 439.
2. A bill seeking to have settled in equity matters capable of enforcement at law should be verified, and when such relief is asked by a defendant in his answer, under rule 123, the answer *must* be verified.
3. The Revised Statutes of the United States, being a new act of legislation, cannot be governed by previous legislation when they differ from it.
4. Congressional debates cannot be much, if at all, regarded on matters of verbal construction of acts of Congress. The language used must be given effect, if it has a consistent meaning, and it is matter of familiar knowledge that members voting for a bill do not always act on the same understanding.
5. There is no act of Congress allowing undivided interests to be granted either to homesteaders or pre-emptioners.
6. Section 2292 of the Revised Statutes of the United States covers every case where there are minor children surviving *both* parents, and in terms gives them the *entire* estate in an uncompleted homestead entry to the exclusion of the adult children.

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Appeal from Chippewa. (Steere, J.) Argued October 10 and 11, 1888. Decided October 19, 1888.

Bill by adult heirs to have a trust declared in their favor to make them share ratably in an uncompleted homestead entry. Defendants appeal. Decree reversed and bill dismissed. The facts are stated in the opinion.

Brennan & Donnelly (Lawrence F. Bedford, of counsel), for complainants, contended:

1. Section 2292, Rev. Stat. U. S., was intended solely to apply to a case where neither widow nor major children survive, and to provide for the infants getting the benefit of the parents' industry by a sale of the homestead interests; citing *Crumb v. Hambleton*, 86 Mo. 501.
2. Where the government issues the patent to the wrong person by reason of a wrong construction of the law, a court of equity will review the action of the officer, and declare the patentee to be a trustee for the benefit of the parties properly entitled to the land; citing *Johnson v. Towsley*, 13 Wall. 82, 88; *Samson v. Smiley*, Id. 91, 92; *Shepley v. Cowan*, 91 U. S. 330; *Steel v. Smelting Co.*, 106 Id. 452; *Quinby v. Conlan*, 104 Id. 420; *Nelson v. Sims*, 28 Miss. 888; *Danforth v. Morrical*, 84 Ill. 456; *Gibson v. Heirs*, 89 Mo. 594.

George A. Cady, for defendants, contended for the rule laid down in the opinion.

CAMPBELL, J. The bill in this cause was filed by complainants, who were heirs of full age of Edward Bernier when he died, in June, 1876, against defendants, who are children or grantees of children not then of age, to settle their common rights under a homestead entry which he made in 1875, and to which, therefore, his title had not become absolute when he died. After his death, complainants, on behalf of all of his heirs at law, elected to make a pre-emption entry and full payment in advance of the five years, as allowed by the homestead act, and did so in the name of them all. In the General Land-

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office this was so changed as to make the patent issue to the "minor heirs" only. Complainants do not seem to have noticed this change until shortly before this suit was brought, when, by reason of a sudden advance in value, it was discovered when the property became desirable for sale. A part of the children who were minors at their father's death were disposed to acquiesce in complainants' rights to share as heirs. The others, when they discovered the condition of affairs, refused to do so. This bill was filed to have a trust declared in complainants' favor to make them share ratably in the land.

John H. Goff, who was grantee of Alfred Bernier, put in a separate answer. Matilda Bernier Endress and Edward Bernier also answered. The other defendants put in no defense, and have not appealed from the decree rendered in favor of complainants. Both of these answers claimed the benefit of a cross-bill. But neither of them was signed by the defendants, and neither was sworn to. The lack of signature would have been a fatal defect on motion to strike from the files, if not waived, as it was waived, by replication. *Kimball v. Ward*, Walk. Ch. 439. The lack of signature may become important, both as to admissions to be used elsewhere, and as to liability for scandal and impertinence, and the defect is not purely formal. The lack of verification seems, however, to be also material. As pointed out in *Moore v. Cheeseman*, 23 Mich. 332, a bill should be verified when it seeks to have settled in equity matters capable of enforcement at law, and it can hardly be allowed by resorting to an answer instead of a cross-bill to get rid of a rule which would be applied to such a bill. As the answer itself could not be objected to on any such ground where oath is waived, there is no way to reach this defect except when relief is asked upon it. Possibly a verification might be allowed on the hearing *nunc pro tunc*, when no injustice would

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follow. But rule 123 is positive as to the necessity of an oath. In the present case, whatever rights defendants have are so purely legal that they do not seem to us to be entitled to stand in equity for anything but a defense. They are open to the further objection that, by answering separately, and by the fact that some defendants did not answer at all, the litigation would be split up into several branches if any relief were granted as asked. We do not feel called on to do more than consider the rights of complainants in the homestead itself as heirs at law. This depends on the statute, which, at the time the homestead entry was made, as well as when the patent issued, was governed by the Revised Statutes of the United States.

The questions arise under what now is contained in sections 2291 and 2292 of these statutes. The Revised Statutes, being a new act of legislation, cannot be governed by previous legislation when they differ from it. The difference which exists is, however, not much more than a slight change of language, and the transfer of a *proviso* into a separate section.

The conditions on which a homestead entry must be completed, so far as important here, are as follows:

By section 2291 it is enacted:

"No certificate, however, shall be given or patent issued therefor, until the expiration of five years from the date of such entry; and if, at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or, in case of her death, his heirs or devisee; or, in case of a widow making such entry, her heirs or devisee in case of her death,"—upon proper proof shall be entitled to a patent.

Section 2292 provides as follows:

"In case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such

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infant child or children; and the executor, administrator, or guardian may, at any time within two years of the death of the surviving parent, and in accordance with the laws of the state in which such children, for the time being, have their domicile, sell the land for the benefit of such infants, but for no other purpose; and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States on the payment of the office fees and sum of money above specified."

There is apparently no authority for issuing a patent under this section directly to the minor heirs, but on the argument it was conceded that, if they were the only persons for whom the homestead interest could have been enforced, the complainants could not question the patent, and this does not seem to be material.

Some reference was made on the argument to congressional debates; but they cannot be much, if at all, regarded on matters of verbal construction. The language used must be given effect if it has any consistent meaning, and it is matter of familiar knowledge that members voting for a bill do not always act on the same understanding. A bill must be separately acted on by both Houses, and approved by the President, and it would be contrary to experience to assume that all three must have acted on absolutely identical information and views.

On examining the section 2291, on which the rights of the general heirs are based, it will be seen at once that this section does not treat the land as heritable, but makes the estate go by designation of persons. If there is a widow, the heirs take nothing. She may not be the mother of the heirs, or of any of them, but she absolutely and completely bars them out. This of itself indicates that the homestead has more reference to actual family occupancy than to inheritance, which may or may not coincide with family residence. We cannot, therefore, assume that any particular significance attaches to heir-

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ship. Children, if there are any, are heirs, but collaterals take where there are no children, and where, therefore, the home has ceased to exist. So even minor and dependent children of an earlier marriage must give way to the second wife, and be cut off if she survives. No consideration of supposed equity can save them. The language of the law is not open to ambiguous construction.

The next section, 2292, by its language, covers every case where there are minor children surviving both parents, and in terms gives them the entire estate. In order to graft a qualification on it, we must assume that the heirs general are by the previous section made favorite and universal successors. But this, as already seen, is not the case; and even children are cut off, where the hardship is manifest. Section 2292 does not stop with the general terms in favor of minors, but gives directions how their interest are to be saved, quite inconsistent with the idea of any other participants. It contemplates that a sale may be made by the personal representative or guardian. This sale is not of an undivided interest in the land, but of all the land. In the present case, for example, the heirs of full age might not have cared to prove up their homestead right, or to commute it by purchase. Had they seen fit to proceed on their own behalf alone, if entitled at all, they could have obtained only an undivided share. But there is no act of Congress allowing undivided interests to be granted either to homesteaders or pre-emptioners. The same difficulty would have attached to any effort to save an undivided share for the minors.

It is very easy to see that this legislation is in some respects imperfect. But we do not think the language of section 2292 is consistent with giving the minors any less than the whole estate.

The fact that the land department has so construed the

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law would not bind the courts, if contrary to the evident meaning of the language. But the language cannot be construed differently without straining its meaning. And the fact that the construction by the office has been not only uniform, but long continued, and, if incorrect, would probably have led to further legislation to remove the wrong, if deemed a wrong, is of some significance on that account, as well as for its reason.

In our opinion the complainants made out no case, and the bill should have been dismissed. But we are not prepared to say that the case is not one where they had reasons justifying them in seeking to have the doubts settled. We are disposed, in reversing the decree as to the appealing parties, and dismissing the bill as against them, to leave parties to pay their own costs.

The other Justices concurred.

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THE DELAWARE & HUDSON CANAL COMPANY v. ELY C. ROBERTS.

Pleading—Notice of recoupment—Contract.

1. A notice of recoupment ought to be as specific as a declaration.
2. In this case it is held that no legal contract was made out by defendant, and that there was nothing for the jury to pass on by way of recoupment.

Error to Lapeer. (Moore, J.) Argued October 11, 1888. Decided October 19, 1888.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

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Kohler & Bentley and *W. W. Stickney*, for appellant.

Geer & Williams, for defendant.

CAMPBELL, J. Plaintiff sued defendant for two car-loads of coal ordered by him in January, 1887, by two written orders, which contained only directions to forward, by one, two cars nut coal, and by the other, one car nut coal.

Defendant admitted the receipt of the coal as claimed, but disputed the price. He also claimed that in July, 1886, he had made a contract with plaintiff for 43 car-loads, at $3.65 a ton for egg and $3.90 for nut coal, to be shipped as he should order it during the season of 1886–87, and that plaintiff had refused to carry it out; and he sought to recoup damages. The plaintiff's claim was for $122.25 and interest. The jury gave defendant a verdict of $232.70 by way of recoupment.

Plaintiff brings error on the ground that no such contract existed, and none was shown.

We think there was nothing to authorize any such verdict, and that plaintiff should have recovered the full amount claimed. The contract set up in the notice of recoupment, which ought to be as specific as a declaration, gives no date or place or other distinct description except in these words:

"A special contract or agreement, made and entered into by and between the said plaintiff and the said defendant in July, 1886, by the terms of which the said plaintiff did sell and agree to deliver to said defendant 43 car-loads of coal at $3.65 and $3.90 per gross ton, respectively for egg and nut coal, to be shipped to said defendant as he might order the same during the season of 1886–87."

By the established rules of pleading such an averment means such a contract as would be valid in law, and in this case, therefore, means a contract such as is

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contemplated by the statute of frauds; and that statute requires all material parts of a contract to be expressed in a signed writing. This would require the consideration on both sides, which would involve, as stated in this alleged contract, an agreement to sell and an agreement to buy and pay the price. Such is the purport of the notice of recoupment, if it means anything.

There was no proof of any written contract in any way corresponding to that set forth, and no proof of a parol contract and delivery under it of such a nature as to take it out of the statute. There was proof that whatever was to be done was decidedly different.

Defendant's story is that on July 14, 1886, he visited plaintiff's office in Buffalo, N. Y., and had a talk with Mr. Mace, whom he found in the office, and Mr. Mace said plaintiff would furnish defendant coal free on board cars at $3.90 gross ton for nut and stove and $3.65 for egg coal; that defendant told him he wanted 15 cars of nut, 15 cars of No. 4, 12 cars of egg, and one car Pardee's Lehigh,—that was to be $6.20. This Pardee coal is not involved in the case; but it creates a variance from the notice, which speaks only of egg and nut coal, not referring to No. 4, and which does not undertake to aver how much of each kind was to be furnished, or what kinds and amounts plaintiff failed to furnish. The testimony is not very much more satisfactory.

Defendant claims to have made at the time some sort of a memorandum, but it was not complete, and was not shown to Mace, who made no memorandum or entry himself. Defendant undertook to swear that he did, but on cross-examination admitted he knew nothing about it. Defendant also said it was understood he wanted to order through the season, as he should want it.

He swore, however, further, as follows:

"I did not see Mr. Mace that day, but I told him

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I would write them when I got home whether I would accept his proposition or not, and when I got home I did write him."

On cross-examination, after mentioning the number of cars he proposed to order, he says:

"I did not tell Mr. Mace that would be my order, nor did he accept my order that day. He made me a proposition to sell me the coal for this price, and I was to let him know if I accepted this proposition. He made me the proposition, and I afterwards accepted it by letter."

Apart from all questions of Mace's authority to contract, of which it is difficult to find sufficient proof, there can be no claim that when defendant was in Buffalo there was any contract whatever. The utmost that could be set up was that there was a preliminary conversation which did not bind defendant to anything, and which therefore did not bind plaintiff. Had plaintiff thereafter entirely refused to make a contract, apart from any statute of frauds, defendant would have had no legal grievance.

It is not claimed that there was ever any written contract. The letter which defendant wrote to plaintiff soon after his return home in July, 1886, and which is the only assumed basis for the claim of recoupment, is not urged as making out any case except as an acceptance of the parol proposition. But in fact it was followed by a letter from plaintiff putting matters on a different footing. This letter he found no fault with, and did not answer. He claims that his subsequent orders were in reliance on the earlier arrangement, and admits he did not answer it. He says:

"After I received the letter of July 26, I did not answer it at all. I had already got through making bargains. I proposed to hold them to the 15 cars No. 4, if I wanted it. There wasn't any acceptance to be made. I didn't answer them at all."

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The letter which defendant wrote after his return home July 24, 1886, was as follows:

"LAPEER, MICH., July 24, 1886.
"DEL. & HUDSON CANAL CO.,
"Buffalo,

"*Gentlemen:* You may enter my order for 15 cars nut, 15 cars No. 4, 12 cars egg, and one car Pardee Lehigh nut; coal to be clean, bright, and free from slate, etc. Do not ship any before September, and I will then say how fast I want it shipped. I called at your office on the 14th of this month, and got prices. I am warranting this coal as good as the best.

"Yours truly, E. C. ROBERTS."

Immediately after this, and on July 26, 1886, Mr. McWilliams, who was the general agent at Buffalo,—Mr. Mace being a traveling agent, with limited powers,—answered it. After acknowledging receipt, he proceeds:

"I am very much afraid that we will not be able to give you 15 cars of No. 4, as that size is always scarce; and as you stipulate that none shall be shipped before September, I regard it as extremely doubtful if we will be able to get that quantity that month, if any. If you will make the order for 7 cars of No. 4, and 8 of stove, we would think the chances better for filling it. Our stove coal generally runs very small, as we leave most of the No. 4 in it. I think that if you will try the stove, it will answer nearly as well as the No. 4. As I remember it, you want the coal shipped on the Mich. Central road, and in Sept. and Oct. Mich. Cent. cars always become scarce, and we may not be able to ship as fast as you will want. If you have any storage room it might be well for you to take in a little coal in August, but of course you will do as you think best. However, the No. 4 will have to be shipped whenever we can get it; but we hope that you will conclude to get along with 7 cars, and a few cars of stove.

"Yours truly,
"R. E. MCWILLIAMS, S. & S. A."

As already stated, defendant never answered or made any reference to this letter. He made orders which were filled from time to time. On December 4 he ordered a

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car of chestnut to be shipped to E. F. Freeman, Port Huron, which on December 9 was declined, because they had arrangements at Port Huron to ship to only their regular dealer. In this same letter defendant was informed they canceled the balance of his unfilled order, because the agent, Mr. Mace, said he sold so many cars to be shipped to Lapeer in September and October.

On December 11, 1886, defendant wrote for the first time, setting out what he claimed to have been his contract with Mr. Mace. This was at once answered by a denial of any authority in Mr. Mace to make such a contract. Mr. McWilliams communicated with Mr. Mace, who replied that he gave defendant figures on what coal he could use to November 1, but defendant gave no order or acceptance of prices, and said he would think of it, and probably send in his order by mail; that the letter of July 24 ordered 43 cars, and the only acceptance of it was the letter of July 26, which objected to the large proportion of No. 4 size, and designated September and October as the times when coal was to be shipped. Mace denied any other contract. This was communicated to defendant at once, on December 31. On that same day plaintiff declined to fill an order for No. 4 coal as not obtainable. Defendant was informed by the same letter that the plaintiff's prices for coal were $4.90 for stove and chestnut, and $4.65 for grate and egg; subject to change without notice.

On the 12th and 14th of January, 1887, defendant ordered the coal sued for in this case, and made no reference to the former correspondence.

From all this it appears that before ordering any coal to be forwarded, defendant—whether there had been any previous understanding or not—was informed that plaintiff did not expect to furnish the coal of the kind or quality which he now asserts should have been furnished, and the letter

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of July 26 is inconsistent with any recognition of such an existing contract. If he claimed differently he was called on without delay to say so. He never said so until December, and his claim was at once repudiated. There was never, therefore, any delivery or shipment on the terms of the alleged parol contract, if it existed, so as to take it out of the statute. But according to defendant's own oath there never was any complete parol contract, and the letters are necessary to make out any agreement according to his own showing, and the letter of July 26 is not consistent with what defendant claims.

It was not important in the circuit court to ask instructions upon the statute of frauds directly, because no contract was shown to have existed in any shape. But the charges asked in regard to the necessity of a meeting of minds, and the effect of the various letters, and acquiescence in their undenied claims, all had a direct statutory bearing, and indicated sufficiently the plaintiff's claim that no contract could be made out except by means of the letters, which failed to do it.

Without, therefore, referring in detail to the errors assigned, we think no legal contract was made out, and there was nothing for the jury to pass on by way of recoupment. We think plaintiff was entitled to recover the January price of the coal furnished, which was $122.25.

Judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

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WILLIAM HAMILTON v. WILLIAM H. HARRIS.

Judgment creditor's bill—Receiver—Partnership.

An order requiring an insolvent debtor, proceeded against under a judgment creditor's bill, which has been taken as confessed, to pay over to the receiver a sum of money which his disclosure shows he has drawn from the business of a firm of which he claims to be a member, and to settle which question he has instituted a suit for an accounting, which order directs the receiver to hold the money subject to the order of the court, and allows the creditors of said firm to take such legal proceedings as they see fit to establish their claims to the money, will not be disturbed on appeal.

Appeal from Wayne. (Gartner, J.) Argued October 16, 1888. Decided October 19, 1888.

Judgment creditors' bill. Defendant appeals from order requiring him to pay over a certain sum of money to the receiver. Order affirmed. The facts are stated in the opinion.

Ed. E. Kane, for complainant, contended:

1. The order is merely interlocutory, and not appealable. Defendant claims to hold the money as a self-constituted trustee, and has no legal title to it; citing *Duncan v. Campau*, 15 Mich. 416; *Brown v. Vandermeulen*, 41 Id. 419; *Taylor v. Sweet*, 40 Id. 739.
2. The order does not determine the final disposition of the money, but places it in the custody of the court for safe-keeping during the pendency of the suit for the benefit of all persons who shall establish rights to it; citing *Tremper v. Brooks*, 40 Mich. 335; *Bank v. Iron Works*, 60 Id. 490.
3. The order protects all of the firm creditors, who, though not parties to the suit, can have their claims determined on petition for an order for their payment by the receiver; citing *Riggs v. Whitney*, 14 Abb. Pr. 390; *DeGroot v. Jay*, 30 Barb. 484; but until they put their claims into judgment they have no right to inquire into the transmutation of assets; citing *Railroad Co. v. Circuit Judge*, 44 Mich. 482.

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Atkinson, Carpenter & Brooke, for defendant, contended:

1. The order is appealable, as it operated to divest defendant of the possession and control of property to which, except as against his partner, he had the exclusive right; citing *Lewis v. Campau*, 14 Mich. 458; *Barry v. Briggs*, 22 Id. 201.
2. Defendant held the money for the partnership. It was in effect a trust fund, and the court had no right to change its custody. Had it been part of the firm stock, complainant could only reach it by execution, under which the partners could not be dispossessed of its possession; citing 2 Lind. Part. (Ewell's ed.) 690; Pars. Part. (2d ed.) 365, 366, 371; *Garvin v. Paul*, 47 N. H. 158; *Gibson v. Stevens*, 7 Id. 352; though the sheriff might hold joint possession with them pending his levy; citing *Brrall v. Acker*, 23 Wend. 606; and purchasers on a sale thereunder would secure only a right to an accounting as against the partnership; citing *Deal v. Bogue*, 20 Penn. St. 228; *Wilson v. Strobach*, 49 Ala. 488; nor could the levy be made on any specific portion of the stock, but only on the partner's interest in the entire stock; citing *Sirrine v. Briggs*, 31 Mich. 443; yet the effect of this order is to divest the possession of a specific portion of the partnership property.

CAMPBELL, J. Complainant, having an execution returned unsatisfied against defendant, filed a statutory creditors' bill against him, which was regularly taken as confessed. The usual order was made appointing a receiver of all of his legal and equitable assets, and he was required to make disclosure. Upon his examination he admitted the possession of the sum of $768. This sum he stated that he drew out from the firm business of Harris & Karpp, a jewelry firm of which he claimed to be a member. He claimed that he did this to bring about a determination whether he was a member of that firm, as Karpp denied his membership. He stated, further, that there was no agreement how much each partner should draw out; that in his opinion the assets would more than meet the liabilities, and, should they do so, this money would not be more than he was entitled to.

On February 20, 1888, defendant made an *ex parte* affidavit, in which he referred to his previous examination,

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and stated that he had filed a bill against Karpp for an accounting and receiver of the firm; and that he thinks the assets will not pay the debts, and in that event the $768 would not in whole or in part belong to him.

The court ordered him to pay over this money to the receiver in the present case, and that the receiver hold it till further ordered, and that any creditors of Harris & Karpp might take such legal proceedings as they should see fit to establish their claims.

From this order Harris appeals.

We can see no ground for the appeal. Whatever interests Harris has belong to this receiver. Harris cannot claim any right to control them. Having the money in his hands, neither the partnership nor the partnership creditors could reach it specifically. It is not in the shape of a tangible note or other security, and is not in a shape to be replevied. If he is responsible to the firm, it is merely as a firm debtor. It is not necessary for us here to decide whether such a debt gives the firm or its creditors any preference over a judgment creditor. That question the court below did not decide. But it is obvious enough that if Harris should be allowed to hold this money, and spend it, everybody might suffer from it, if he did not really own it; while if, as his examination tended to show, and as is at least possible, the partnership assets will pay the debts, then this money would all belong to him. It was proper for the court to take it into custody to have these claims disposed of. If any one is affected in interest, it is the firm and its creditors, and not Harris. He has no right to withold it on his own account, and the order cuts off no partnership claims. Their rights are saved, if they have any.

The order should be affirmed, with costs.

The other Justices concurred.

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The People v. Albert Rouse.

Criminal law—Liquor law—Punishment—Sentence.

1. How Stat. § 2275 (providing for the punishment of violators of the liquor law), contemplates an *immediate* imprisonment, which may continue 90 days, with or without payment of the fine and costs.
2. It is no ground of error that a sentence is *less* than it might have been, so long as it does not involve a different kind of punishment than that allowed by law.

Error to Clinton. (Smith, J.) Argued October 17, 1888. Decided October 19, 1888.

Respondent was convicted of a violation of the liquor law. Conviction affirmed. The facts are stated in the opinion.

Fedewa & Lyon, for respondent.

Moses Taggart, Attorney General, and *Charles M. Merrill,* Prosecuting Attorney, for the people.

Campbell, J. Respondent was convicted before a justice in Clinton county for keeping his bar open on July 4, 1887. The justice sentenced him to pay a fine of $50 and costs, and in default of payment to be imprisoned in the county jail 90 days, unless it should be sooner paid. This judgment was removed by *certiorari* to the circuit court on the single error assigned that the sentence was unlawful, as conditional, and not fixing a time within which the fine could be paid. The circuit court affirmed the judgment, and error is brought on that affirmance.

The conviction was on September 27, 1887, and the judgment was that in default of payment the respondent—

"Be imprisoned in the common jail of the said county

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of Clinton for the period of 90 days from and including this 27th day of September, 1887, unless said fine is sooner paid."

This undoubtedly contemplates an immediate payment or imprisonment, and it is claimed a time should have been allowed for payment.

This case is governed by the sections of the liquor law then in force, which were sections 2274, 2275, How. Stat. We need not, therefore, consider how far the objection taken would have applied under the general laws applicable to justices' courts.

By section 2275 the punishment is thus provided for: The offender, on conviction,—

"Shall be punished by a fine of not less than twenty-five dollars, nor more than one hundred dollars, and costs of prosecution, and imprisonment in the county jail not less than ten days, nor more than ninety days, in the discretion of the court. And in case such fine and costs shall not have been paid at the time such imprisonment expires, he, the person serving out such sentence, shall be further detained in jail until such fine and costs shall have been fully paid: *Provided,* that in no case shall the whole term of imprisonment exceed ninety days."

This statute contemplates an immediate imprisonment, which may continue 90 days, with or without payment of the fine and costs. This sentence, of which respondent complains, allows him to be set at liberty at once, on payment, without any further imprisonment whatever. It is therefore within the authorized punishment, but lighter than it might have been.

It is no ground of error that a sentence is less than it might have been, so long as it does not involve a different kind of punishment than that allowed by law. If there was any error in this sentence it was not against respondent's rights, and he has nothing to complain of.

The judgment must be affirmed.

The other Justices concurred.

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THE CLEVELAND IRON MINING COMPANY v. MAREN HUSBY, ADMINISTRATRIX OF THE ESTATE OF ANDERS HUSBY, DECEASED.

Equity—New trial at law—Perjury.

1. The weight of authority is decidedly against the granting of a new trial in a court of equity to impeach the testimony of witnesses, or because a party has committed perjury, or even suborned a witness to commit perjury. *Gray v. Barton*, 62 Mich. 186.
2. It is best, as a matter of public policy, that a judgment obtained in a court of law should stand, unless it is manifestly against conscience. In that case, or in a case where a perjury of a witness has been fully established by judicial determination, or by written documents, equity may very appropriately deny relief.

Appeal from Marquette. (Grant, J.) Argued May 2, 1888. Decided October 26, 1888.

Bill for a new trial at law. Complainant appeals. Decree dismissing bill affirmed. The facts are stated in the opinion.

Hayden & Young, for complainant, contended:

1. A new trial will be granted in equity for fraud or perjury of witnesses, whereby an unjust judgment without complainant's fault has been rendered against him, and after he has been barred at law; citing *Hoskins v. Hattenback*, 14 Iowa, 314; *Fletcher v. Warren*, 18 Vt. 45; *Ballance v. Loomiss*, 22 Ill. 82; *Seward v. Cease*, 50 Id. 228; *Jennison v. Haine*, 29 Mich. 219; *Cox v. Railway Co.*, 44 Ala. 611; *Rolling Mill Co. v. State*, 54 Ga. 644, 645; *Nudd v. Ins. Co.*, 25 Minn. 100; *Wingate v. Ferris*, 50 Cal. 105; *Stowell v. Eldred*, 26 Wis. 507, 508; *Coddrington v. Webb*, 2 Vern. 240.

E. E. Osborn, for defendant, contended:

1. The verdict of $5,000 is not an excessive recovery for a widow with two children to support, and in hopelessly destitute cir-

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cumstances; citing *Staal v. Railroad Co.*, 57 Mich. 239; *Railroad v. Armstrong*, 52 Penn. St. 282.

2. As to when courts of equity will enjoin or annul judgments or decrees, counsel cited *Hendrickson v. Hinckley*, 17 How. 443; *Crim v. Handley*, 94 U. S. 652; *U. S. v. Throckmorton*, 98 Id. 61.

3. The court will not set aside a judgment because it was founded on a fraudulent instrument or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed; citing *U. S. v. Throckmorton*, 98 U. S. 61; Story, Eq. Jur. § 887; *Humphreys v. Leggett*, 9 How. 297; *Ins. Co. v. Hodgson*, 7 Cranch, 333; *Creath v. Sims*, How. 192; *Metcalf v. Williams*, 104 U. S. 93.

4. Before equity will grant relief, three things must concur: Ignorance of the defense when the judgment was rendered, diligence on the part of complainant, and the fact that adequate relief cannot be had at law; citing *Taylor v. Sutton*, 15 Ga. 103.

5. Equity will not relieve against a judgment at law except for fraud, accident, surprise, or manifest injustice, unmixed with fault or negligence on the complainant's part; citing *Pearce v. Chastain*, 3 Kelly (Ga.), 226; *Phelps v. Peabody*, 7 Cal. 50; *Rice v. Bank*, 26 Tenn. 39.

6. A party seeking to enjoin a judgment must show that plaintiff had no cause of action; citing *Huebschman v. Baker*, 7 Wis. 542; or that it is clearly contrary to equity and good conscience; citing *Moore v. Gamble*, 1 Stockt. Ch. 245; or that he had a good defense, of which he had no knowledge until after judgment, or that he was prevented from using it by fraud or accident or the acts of the adverse party, unmixed with negligence or fault on his part; citing *Robbins v. Mount*, 3 Kelly (Ga.), 74; *Brandon v. Green*, 26 Tenn. 130; *Meek v. Howard*, 10 Smedes & M. 502; *Powell v. Wattson*, 6 Ired. Eq. 94; *Glover v. Kedges*, 1 N. J. Eq. 113; *Morris v. Hadley*, 9 Mich. 278; *Miller v. Morse*, 23 Id. 365; *Gray v. Barton*, 62 Id. 186.

F. O. Clark, for defendant, contended:

1. The decision of the circuit judge on the motion for a new trial is *res judicata;* citing *Gray v. Barton*, 62 Mich. 186; *Miller v. Morse*, 23 Id. 365; *Danaher v. Prentiss*, 22 Wis. 311; *Collins v. Butler*, 14 Cal. 223; *Crim v. Handley*, 94 U. S. 652; *Simpson v. Hart*, 1 Johns. Ch. 91; *Kurtz v. Carr*, 105 Ind. 574 (5 N. E. Rep. 692).

MORSE, J. This is a bill in equity, filed in the cir-

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cuit court for the county of Marquette, in chancery, for a new trial of a suit at law, in which the complainant was cast in damages. The corporation moved for a new trial in the circuit, which was refused, and then brought the case at law to this Court by writ of error, where it is still pending.

The bill is founded principally upon the allegation that the most important witness for the plaintiff in the suit at law committed perjury upon the trial, which was also a surprise to the defendant in such suit, who is complainant here.

We said in *Gray v. Barton*, 62 Mich. 197 (28 N. W. Rep. 817), that the—

> "Weight of authority is decidedly against the granting of a new trial in a court of equity to impeach the testimony of witnesses, or because a party has committed perjury, or even suborned a witness to commit perjury."

See, also, *Miller v. Morse*, 23 Mich. 365. It is best, as a matter of public policy, that a judgment obtained in a court of law should stand, unless it is manifestly against conscience. In that case, or in a case where a perjury of a witness has been fully established by judicial determination, or by written documents, equity may very appropriately grant relief.

To permit, however, after a trial has been concluded at law, and the trial court has refused upon motion and hearing to grant a new trial, the losing party to hunt up a witness of the prevailing party, and procure from him an affidavit that he has sworn falsely upon the trial, and by this means carry the controversy, as to a new trial, into a court of equity, would open the door to manifold abuses, and to an uncertainty in the administration of law, not to be desired in the interest of justice, and which would necessarily give to the stronger party financially an undue advantage in litigation. There would be but few

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suits at law which in this way, after judgment, could not be opened up again in chancery. The present case is a fair example of the abuses to which such a course might expose every litigant in a suit at law.

A statement of the case here becomes necessary; and a bare recital of the facts will, we think, show the desirability of adhering pretty strictly to the rule as laid down in *Gray v. Barton, supra.*

On March 22, 1886, Anders Husby, a native of Sweden, was killed in the iron mine of the complainant. The defendant here, as administratix of his estate, brought suit in the circuit court for the county of Marquette, in which the mine was situate, against the complainant, to recover damages for negligent killing. She obtained judgment in that court on December 14, 1886, for $5,000 damages. On February 25, 1887, a motion was made before the circuit judge for a new trial upon several grounds, among which was the following:

"8. Because injustice was done defendant on said trial in the production of evidence thereon which was misleading and untrue."

April 27, 1887, this motion was denied. April 30, 1887, a bill of exceptions was settled in the circuit court.

At the trial in the circuit court, one of the principal witnesses for the administratrix was Ludwig Strand, also a Swede, and not very conversant with the English language.

The negligence of the complainant, complained of in the suit at law, was substantially as follows: In the pit in which the deceased, Husby, was working under a "shift-boss," there was a large mass of rock, immediately over the place where deceased was working, which was loose, and likely to fall; that the attention of the complainant was directed to it, through its shift-boss, whose attention was called to it; but, disregarding the danger

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to which said deceased would be subjected by going to work under the said rock, the said Cleveland Iron Mining Company, by its said shift-boss, and without warning to him of the danger, ordered the deceased to go to work under said rock, which shortly afterwards fell from the roof, and killed him.

Upon the trial Ludwig Strand testified, in substance, that he was working in this pit with the deceased and others; that one of the workmen, Gustave Ladie, went up on a ladder, and examined the roof. The shift-boss thought it was all right, but Ladie told him it was not; but Williams, the shift-boss, told them to go to work. Strand also testified that he was looking at the roof, and saw a large crack therein that he could put his finger in. He claimed he went up the ladder, and saw this crack, and several others, in the roof, and that he could see the cracks from the bottom of the pit.

Upon the motion for a new trial, the affidavit of Strand was presented to the court in favor of the motion under the eighth ground or reason assigned for a new trial. This affidavit was made February 17, 1887, before one T. W. Durham, a notary public. In this affidavit Strand affirmed that he did not go up the ladder until after the accident; that he never intended to say that he went up before in his testimony, or that he could see the cracks in the roof from the bottom of the pit by looking up; that he does not well understand the English language, was examined without an interpreter, and did not fully understand what he testified to.

"He further says that he could not in truth and fact stand on the bottom of the room in which the accident happened, about which he testified, and see a crack of the size of the one in question; that he is satisfied that it would be impossible so to do, because the room is always filled with smoke, besides being dark; that he does not

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remember whether, after the ore fell, he looked up to see if he could see whether the crack remained there, but if he had looked he could not have seen from the bottom; that he does not know, of his own knowledge, whether the crack which he saw before the fall was or was not there after the fall. He did not look to see, so far as he can remember."

The affidavit of one John Brandin was also presented. He deposed that, before Strand's affidavit was drawn up, the testimony of Strand, as printed by the stenographer from his notes taken on the trial, was shown to him, and Strand read the same, and stated to Brandin that such testimony was wrong and untrue, and thereupon the affidavit was drawn; that Strand understood the affidavit, and the difference between that and his testimony taken on the trial. Strand said he was scared upon the trial, understood English imperfectly, and had no interpreter. Strand read the affidavit, and Brandin talked with him, and explained it to him. Brandin is also a native of Sweden.

Ladie also made an affidavit, which was used on the motion. In this affidavit Ladie states that he went up the ladder, and saw one crack, and only one, in the roof. He came down and told the shift-boss:

"It's bad ground up there; it will come down very soon." He said: "It's all right; John Beerling has been barring it."

Ladie, or Leijdi (as it is often spelled in the record), states in this affidavit that the "young Swede" (meaning Strand) stood there, and heard his remark to the shift-boss, but that the "young Swede" did not go up the ladder after he (Ladie) came down. Ladie was not sworn upon the trial in the law case, but was examined as a witness for the defendant in this suit, and testified that he went up the ladder and came down by the order

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of the shift-boss. Told him it was bad ground, and it would "come down pretty quick." The shift-boss said to him:

"All right, you look; he is all right; all right, fill the car."

Other affidavits were presented which it is not necessary here to notice.

April 27, 1887, Judge Grant denied the motion for a new trial.

On May 19, 1887, George W. Hayden, one of the attorneys of the Cleveland Iron Mining Company in these suits, made a criminal complaint against Ludwig Strand, and a warrant for perjury was issued against him. The warrant was given to Jacob Dolf, a deputy-sheriff of Marquette, who came to Ishpeming. He testifies that he was ordered to arrest Strand, and get admissions out of him; that he was a sort of detective; that he did not caution him as to admissions. Instead of taking Strand before the magistrate, as his warrant commanded, he first drove to the office of the mining company, and met the manager, Bacon, who told him to keep Strand in custody until Monday. The arrest was made on Saturday. Dolf then took Strand to the office of the complainant's attorneys, where Strand claims they insisted upon his taking back his testimony as to going up the ladder. Dolf then took him to Marquette, under Hayden's directions, and had him go before Judge Grant, with whom he had a conversation about his testimony. He was then sent back to Ishpeming, and directed to appear before the justice on Monday, which he did.

The prosecuting attorney of the county was one of the attorneys for the Cleveland Iron Mining Company.

On Monday, without counsel, Strand was arraigned before the justice. No witnesses were examined against him, but he was examined, and his evidence taken down

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by the justice; the questions being propounded to him by the attorneys of the mining company. He was not asked if he wished counsel, or to give bonds without examination. After his own deposition, Strand was bound over to court, and gave bond in $200, which bond was signed by himself and one John Peterson.

When the circuit court met, his case was, on the motion of the court, discontinued, because the circuit judge was—

"Satisfied, from an examination of the testimony taken in the civil suit, and from an examination and his knowledge of the proceedings in this case, it would be idle to expect a conviction in the case."

In the present suit, Strand was again examined as a witness, and gave, in substance, the same testimony as he did in the case at law, claiming that he was scared, and did not understand what he said, or what was written in his affidavit used on the motion for a new trial, or in his deposition before the justice. There seems to be good reason for this claim. Strand is an ignorant man, and speaks and understands English very imperfectly. At the time he gave his testimony in the suit at law, he was in the employ of the mining company, and remained in its employ through all these proceedings, until a few days before the trial of the present suit, when he was discharged. He did not make the affidavit, used on the motion for a new trial, of his own free will and accord, nor had he stated to any one before the day such affidavit was made that he had not told the truth on the first trial.

It is admitted and stated by the counsel for the mining company, in their brief filed in this case, that—

"The company's counsel were directed by the superintendent to prosecute Strand for perjury, if it had been found that he swore falsely. With all the circumstances

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to influence belief at this time that Strand had sworn falsely, it was not known to be so. Strand was suspected, but was not proven guilty, and could only be so treated. In spite of all efforts, the whereabouts of Mickelson were not discovered until May 17 or 18 following the trial.

"In the mean time, on February 17, 1887, Strand was sent for to come to the office of the company's counsel, in company with one John Brandin, a Swede and neighbor, to talk for him. In despair of finding Mickelson, it was evidently thought one way only remained to get the truth from him, viz., by extorting it from him if possible. On hearing read the minutes of his testimony given on the trial, Strand said that if he had ever testified that he could see where the ore came from which fell on Husby he had made a mistake, for it was too dark there to see. He excused his testimony by saying he couldn't understand English very well, and was sorry he had made so much trouble. Thereupon his affidavit was obtained to this effect. 'A half loaf was better than no bread' to the company."

And Brandin was not alone with Strand when he talked with him. At least one of the company's counsel was present, and the affidavit was drawn by such counsel, and sworn to before a clerk in the office. Ordinarily, an affidavit procured under such circumstance would weigh but little in a court of justice, nor could perjury be well predicated upon it. It cannot be said that this poor, ignorant laborer, knowing but little of our language, has been fairly treated by the complainant and its counsel in this case. He has been more sinned against than sinning.

It is worthy of note, also, that the same circuit judge who has heard the testimony of Strand upon two trials, heard also his affidavit upon the motion for a new trial, and privately examined him besides as to the facts, has dismissed the complainant's bill in this case.

If this manner of proceeding shall be made a precedent, by granting complainant a new trial, it will open the door to frauds and abuses unworthy the proper administration of the law. The losing party need only find an

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ignorant witness, and by persuasion, fear, or threats procure different statements, to open anew every contest at law; and thus the settlement of litigation may be indefinitely postponed. I can see no equity in permitting this proceeding to end, as was desired when commenced, in a new trial at law of this case. Nor does it appear that a new trial would alter the result.

Granted that by these proceedings the worth of Strand's testimony has been destroyed, there yet remains the evidence of Ladie, and of at least one other witness, that the shift-boss was notified of the danger in the roof, and yet ordered the men to work under it.

It is claimed that there is a witness, Mickelson, who could not be procured at the time of the trial in the law court, who will testify, in substance, that there was only one crack in the roof, and that could not be "barred down," and was supposed, therefore, to be safe, and that Strand did not go up the ladder. It is claimed by complainant's counsel that Mickelson was not sworn upon the trial at law because, after due diligence, he could not be found. His affidavit was procured on May 19, 1887, and is a part of the record in this case. In this affidavit he deposes substantially as claimed by the counsel; but he admits that Ladie went up the ladder after Beerling had tried to bar down this crack; that Ladie said to one of the workmen, when he came down, "It's too bad; we can't stay under here;" that the "boss" said to Ladie, while he was up there, "Come down, Gus, and fill up the car," and Gus said, "No, its too bad here;" and the boss replied, "Well, you have to come down and fill up the car." Mickelson did not testify in this suit, and it does not seem that any great effort was made to produce him. There is no assurance that he can be procured to testify on another trial; and, if he should testify in the same line as his affidavit, we do not think it would benefit the complain-

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ant any more that it would defendant. Although his evidence would contradict that of Strand, as to the latter's going up the ladder, it would also show that the shift-boss was notified by Ladie of the danger of this rock falling, and yet ordered the work under it to go on.

The bill in equity was rightfully dismissed, and the decree of the court below will be affirmed, with costs.

SHERWOOD, C. J., CHAMPLIN and LONG, JJ., concurred. CAMPBELL, J., did not sit.

JOSIAH W. BEGOLE v. OREN STONE.

Sale—Retention of title as security—Bona fide incumbrancer—Charge to jury.

Where the *bona fide* holder of a chattel mortgage replevied the property from a third party, who claimed to have sold it to the mortgagor, conditionally, retaining the title until paid for, his rights under such sale should not be submitted to the jury apart from the circumstances tending to show, as claimed by the plaintiff, that by his conduct he had waived or abandoned his rights in the property.

Error to Genesee. (Newton, J.) Argued May 15 and 16, 1888. Decided October 26, 1888.

Replevin. Defendant brings error. Affirmed. The facts are stated in the opinion.

Durand & Carton, for appellant, contended:

1. In favor of the right of a vendor to pass possession of property to a vendee, while retaining title in himself, and to impose conditions precedent upon the transfer of the title, and that until such conditions are complied with no title passes to the vendee, nor can he convey any to third parties; citing *Couse v. Tregent*,

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11 Mich. 65; *Dunlap v. Gleason*, 16 Id. 158; *Whitney v. McConnell*, 29 Id. 12; *Smith v. Lozo*, 42 Id. 6; *Mfg. Co. v. Jeffery*, 49 Id. 288.

Hicok & Russell, for plaintiff, contended:

1. The contract was one of suretyship, and not a conditional sale. In all doubtful cases the law will construe a contract to be a mortgage, and not a conditional sale, and the surrounding circumstances will be taken into consideration in construing the instrument; citing *Cornell v. Hall*, 22 Mich. 377; *Hurd v. Brown*, 37 Id. 484; *Cooper v. Brock*, 41 Id. 488; *Iron Works v. Teuton*, 67 Id. 623.

SHERWOOD, C. J. This is an action of replevin, brought by the plaintiff to recover two pianos and an organ. The property was taken upon the writ, and delivered over to the plaintiff.

The plea was the general issue, with notice that defendant would show that, if he ever had possession of the property, it was because he held the legal title at that time, and was so to continue to hold the same until a certain sum of money, to wit, $250, and the accruing interest thereon, should be paid upon a note signed by him on account of the purchase of the property, and which has never been paid, nor defendant released from said note; defendant being entitled to possession of the property until thus released.

The cause was tried in the Genesee circuit by jury, before Judge Newton, and the plaintiff prevailed. The cause is now before us for review on error. Eight errors are assigned.

In February, 1887, J. C. Stowell was proprietor of a normal school in the city of Flint, and on May 3 of that year gave the plaintiff a chattel mortgage upon the property; he claiming to be the owner thereof, and in the apparent possession, at the time. The mortgage became due on or about July 6, 1887, and, not being paid, the

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plaintiff foreclosed his mortgage, and, finding defendant in possession of the property, and refusing to give it up, plaintiff brought this suit, basing his right to the property upon the interest he obtained through the mortgage. At the time of the giving of the plaintiff's chattel mortgage, Stowell had rented of a company, who owned it, the Conservatory of Music, and the property was situate therein, and used by him in connection with his school. The company owned the pianos and organ at the time Stowell claimed that he bought them.

It was the theory of the defendant, and he gave testimony tending to show, that he bought the property of the Conservatory of Music, and sold it to Stowell, giving him time to pay for it, upon the condition that the title should remain in defendant until the property was paid for, and that a certain time was fixed for payment; that Stowell never paid for the property, and never had any exclusive possession of the same.

It was the claim of the plaintiff that the sale to Stowell was absolute, and passed the title to him, and which was long before the mortgage was given, and he gave testimony to that effect.

Upon these two theories the cause was tried; Stowell and Stone testifying directly opposite to each other upon the main question, and there were corroborating circumstances tending to support each. The jury passed upon this conflicting evidence, and found for the plaintiff.

It remains to be ascertained whether error was committed in the charge or any of the rulings of the court. If not, the judgment must stand. The assignments of error all relate to the charge and refusals to charge.

At the close of the trial counsel for defendant asked the court to give the following requests:

"1. If the jury find that it was agreed between defendant, Stone, and J. C. Stowell that, in consideration that

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Stone signed the note for two hundred and fifteen dollars in part payment for the pianos and organ in question, the pianos and organ were to belong to Stone until the note should be paid by Stowell, and that Stone signed said note upon that agreement, then the plaintiff cannot recover, and defendant is entitled to a verdict for the amount unpaid upon said purchase price, and which Stone became liable for and paid.

"2. Stowell could give no better title to the property than he himself had, and he could only mortgage that which belonged to him."

These were not given altogether as requested, and defendant's counsel excepted. The court gave the following requests as asked by counsel for plaintiff:

"4. If the arrangement was as Mr. Stone stated it to be, and the jury find the fact to be that Mr. Stone was the real purchaser of the property, and that Mr. Stowell was simply Mr. Stone's agent in the matter, still, if they find that Mr. Stone allowed Mr. Stowell to hold himself out to the world as the real owner of the property, and allowed the property to remain in Mr. Stowell's possession, he cannot defend against an innocent purchaser or person who has dealt with Mr. Stowell in good faith, believing the property to have been his, and who had no means of knowing that Mr. Stone had any interest in the property."

"6. If the jury shall find that Stowell purchased the property for Stone without disclosing that fact, and that Stone never asserted any act of ownership over them, and allowed Stowell to assert himself as the true owner, he was bound by his subsequent acts, and in that case you will find for the plaintiff."

"8. Mr. Stone might have protected himself perfectly by taking the property into his possession, or by taking a chattel mortgage on the same, and filing it in the city clerk's office.

"*By the Court.* That is true as an abstract proposition of law.

"9. Mr. Stone could not have made a conditional sale to Stowell unless he had the title to the property. If the jury find that the title to the property at the time the sale of the property took place was in the Conserva-

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tory of Music, then Stone could not have made a conditional sale to Stowell, and in that case you must find for the plaintiff."

The difficulty with defendant's first request is, it ignores the question of suretyship of Stone upon the note, and the question of waiver of the rights Stone claimed, if what Stone claims is true, by the manner he allowed the vendee to treat and handle the property. There was no doubt but that the plaintiff was a *bona fide* holder of the mortgage interest, and his lien, if he had any, was in good faith; and the rights of the defendant under a conditional sale to Stowell, such as Stone claimed, should not have been submitted to the jury apart from the circumstances showing or tending to show that such rights, by the conduct and treatment of Stone, had been waived or abandoned; and this the court was asked to do in this request.

Stone swears that Stowell used the property, had possession of the room in which it was placed; and Bates says he delivered the property to Stowell when the sale was made. These are facts of much significance, coming from the defendant and this witness.

The second request of defendant, while true in the abstract, under our recording laws must be taken with some qualifications, and under the facts in this case should not have been given without the qualifications. I see no error in refusing these requests as asked.

There was no error committed in giving the four requests asked by counsel for plaintiff. Under the circumstances of the case, and theories of counsel, they were clearly proper and appropriate.

There was testimony in the case tending to show that Stowell bought the property of the Conservatory of Music. The plaintiff's testimony tends strongly to show this.

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There is no question but that the plaintiff's mortgage was duly filed.

Three paragraphs of the charge of the court were excepted to by counsel for defendant, which were given upon the court's own motion, and an examination of the same has not disclosed any error which we think should be held sufficient to reverse this judgment, and it must therefore be affirmed.

CHAMPLIN, MORSE, and CAMPBELL, JJ., concurred. LONG, J., did not sit.

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JOHN CARMICHAEL ET AL. v. IRA CARMICHAEL ET AL.

Will—Agreement as to testamentary disposition—Statute of frauds—Part performance—Equity.

1. A person may enter into a valid agreement binding himself to make a particular testamentary disposition of his property. *Faxton v. Faxon*, 28 Mich. 159; *Sword v. Keith*, 31 Id. 247; *Mundy v. Foster*, Id. 313; *DeMoss v. Robinson*, 46 Id. 62.
2. Where pursuant to a mutual agreement resting partly in parol, and involving the disposition of land, a father and mother made their respective wills, and the father died leaving his will unrevoked, and the mother accepted the provisions made in her favor therein, there has been such a performance and acceptance as takes the agreement out of the statute of frauds, and equity will decree performance by the mother, or take such steps as will prevent her from violating her part of the contract, in fraud of the rights of parties interested therein.

Appeal from Hillsdale. (Watts, J.) Argued June 5, 1888. Decided October 26, 1888.

Bill to enforce specific performance of agreement as to testamentary disposition of property. Complainants appeal.

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Decree reversed, and one entered granting the relief sought. The facts are stated in the opinion.

J. V. Rogers (E. L. Koon, of counsel), for complainants, contended:

1. The transaction of August 14, 1884, by which the two deeds and life-lease were brought into existence to defraud the complainants out of their future contingent interest in the 40 acres of land mentioned in said instruments, should not, under the evidence, be upheld, thus giving judicial sanction to a transaction into which fraud, conspiracy to cheat, want of consideration, undue influence, mental incapacity, abuse of confidence, and legal disability all entered; citing *Seeley v. Price*, 14 Mich. 541; *Wartemberg v. Spiegel*, 31 Id. 400; *Jacox v. Jacox*, 40 Id. 473; *Thorn v. Thorn*, 51 Id. 167; *Raynett v. Baluss*, 54 Id. 469; *Crawford v. Hoeft*, 58 Id. 1; *Twist v. Babcock*, 48 Id. 513; *Leonardson v. Hulin*, 64 Id. 1; *Churchill v. Scott*, 65 Id. 485; *McDaniel v. McCoy*, 68 Id. 332.

2. The agreement between Charles and Ann Carmichael, which was consummated by the making of their mutual wills, should be upheld, on the ground that it is not only an equitable and fair division of the property, but it is legal and in accordance with well-settled rules of equitable law; citing Williams, Ex'rs (6th Am. ed.), 12, 13, 162, 163, and notes; *Dufour v. Bereira*, 1 Dickens, 419; *Rivers v. Rivers*, 3 Desaus. (S. C.) 188; *Walpole v. Orford*, 3 Ves. 401; *Masterman v. Maberly*, 2 Hagg. 103 (top); *Loffus v. Maw*, 3 Giff. 592; *Vanduyne v. Vreeland*, 11 N. J. Eq. 370, 12 Id. 142; and as to what is a sufficient agreement see *Johnson v. Hubbell*, 10 N. J. Eq. 332; *Ex parte Day*, 1 Brad. (N. Y.) 476; and see, also, *Lee's Appeal*, 53 Conn. 363; *Gates v. Preston*, 41 N. Y. 115; *McKeegan v. O'Neill*, 22 S. C. 454; *Allen v. Allen*, 28 Kan. 18; *Wood v. Roane*, 35 La. Ann. 865; *Towle v. Wood*, 49 Am. Rep. 326; *Rogers v. Probate Judge*, 11 Me. 303; *In re Diez*, 50 N. Y. 88; *Schumaker v. Schmidt*, 44 Ala. 454; *Lewis v. Scofield*, 26 Conn. 452; *Taylor v. Mitchell*, 87 Penn. St. 518; and for cases bearing indirectly on this proposition, see *Reithmaier v. Beckwith*, 35 Mich. 110; *Faxton v. Faxon*, 28 Id. 159; *Sword v. Keith*, 31 Id. 247; *DeMoss v. Robinson*, 46 Id. 62; *Mundy v. Foster*, 31 Id. 313; *Leonardson v. Hulin*, 64 Id. 1.

A. St. John, for defendants, contended:

1. If complainants are entitled to relief, it must be on a bill in the nature of a proceeding for specific performance of an oral contract to convey land; citing *DeMoss v. Robinson*, 46 Mich. 62;

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Harder v. Harder, 2 Sandf. Ch. 19; *Gould v. Mansfield*, 103 Mass. 408.

2. To authorize a decree for specific performance of a parol contract, its terms must be so clear and complete as to admit of no reasonable doubt respecting its enforcement according to the understanding of the parties, and such acts of part performance as will justify such enforcement, and payment of the purchase price; citing *Burtch v. Hogge*, Har. Ch. 31; *McMurtrie v. Bennette*, Id. 126; *Millerd v. Ramsdell*, Id. 391, 392; *Wilson v. Wilson*, 8 Mich. 1; *Mowrey v. Vandling*, 9 Id. 39; *McClintock v. Laing*, 22 Id. 212, 217; *Blanchard v. Railroad Co.*, 31 Id. 43, 53; *Wright v. Wright*, Id. 380; *Brown v. Brown*, 47 Id. 378, 384; and the proof must make the same case stated in the bill; citing *Harwood v. Underwood*, 28 Mich. 427; *Ford v. Loomis*, 33 Id. 121; *Peckham v. Buffam*, 11 Id. 529; *Dunn v. Dunn*, Id. 284; *Wurcherer v. Hewitt*, 10 Id. 453; *Covell v. Cole*, 16 Id. 223.

3. Ann Carmichael did not deliver her will, except for safe keeping. If it was a deed irrevocably conveying land, it ought, at least, to have been delivered; citing Schouler, Wills, § 274; *Nichols v. Chandler*, 55 Ga. 369; and the mere fact that the will was put into Mercer's hands will not bind her,—it was still revocable; citing *Jackson v. Phipps*, 12 Johns. 418; *Austin v. Curtis*, 41 Mich. 723.

4. The conduct of relations and others towards individuals is better evidence of what they think of their mental soundness than any words they can use to express such thoughts; citing *Jacox v. Jacox*, 40 Mich. 473.

5. When the language employed in a will is clear, and of well-defined force and meaning, extrinsic evidence of what was in fact intended is inadmissible to qualify, explain, enlarge, or contradict this language; citing Schouler, Wills, § 568; 1 Greenlf. Ev. § 299; *Canfield v. Bostwick*, 21 Conn. 550; *Brown v. Saltonstall*, 3 Metc. 426.

6. Whether a writing is a will depends upon its contents, and not upon any declarations of the maker when he executes it; citing *Patterson v. English*, 71 Penn. St. 454.

7. As to when parol evidence is admissible to aid in the construction of a will, see *Tuxbury v. French*, 41 Mich. 7; *Cleverly v. Cleverly*, 124 Mass. 314; *Dunham v. Gammett*, Id. 151; 1 Greenlf. § 287.

8. A will may embody another instrument or document, and make it a part of it; citing Schouler, Wills, § 281; but in order to do so it must on its face plainly refer to the extraneous writing, which must be in existence at the time the will is made; citing

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Newton v. Society, 130 Mass. 91; *Lucas v. Brooks*, 18 Wall. 436; *Baker's Appeal*, 107 Penn. St. 381.

Thomas A. Wilson, for defendants, contended:

1. If the oral agreement is conceded, it was void under the statute of frauds, so far as it related to the disposition of land; citing *DeMoss v. Robinson*, 46 Mich. 62; *Harder v. Harder*, 2 Sandf. Ch. 19; *Gould v. Mansfield*, 103 Mass. 408; *Schumaker v. Schmidt*, 44 Ala. 454.
2. Had they been mutual wills, made by the same instrument, either party could have revoked it, so far as it was his or her will, at pleasure; citing *Betts v. Harper*, 39 Ohio St. 639; *In re Diez*, 50 N. Y. 88; *Mandlebaum v. McDonell*, 29 Mich. 91.

MORSE, J. The complainants are two sons and a daughter of Charles Carmichael, Sr., now deceased, and the defendant Ann Carmichael. The defendants Ira Carmichael and Charles Carmichael are brothers of the complainants. Hattie E. Disbrow is a sister. Charles I. Carmichael, known in the record as Charles Ira, is a son of the defendant Ira Carmichael.

Charles Carmichael, Sr., in 1858, lived in Wheatland, in the county of Hillsdale, and owned 160 acres of land. In that year the complainant Delos Carmichael was convicted of a State-prison offense. His father was his bail. Delos absconded, with the full consent of all the family. His father settled the bond at an expense of something over $1,000.

About this time the father deeded 120 acres of his land to his son Charles, reserving and keeping the title to 40 acres, the homestead, and in his own name. The 120 acres was afterwards deeded back to the father, excepting 40 acres, which at his request was conveyed by Charles to his mother, the defendant Ann Carmichael.

Soon afterwards, and up to 1866, different conveyances were made by the father to his children, in which his wife joined. By these deeds Ira received 58 acres; Charles, Jr., 35 acres; and John, 22 acres. Hattie was given $1,000

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with which to purchase 20 acres of land. This left 60 acres remaining in the name of the father, and 40 acres in the name of the mother, lying together in one tract. The children took possession of the respective pieces of land conveyed to them. It does not appear that any provision was made at this time for the complainants Delos and Matilda.

November 9, 1872, the father and mother made wills. The will of the former bequeathed all the personal property to his wife absolutely, and the 60 acres of land to her during her life-time. At her death Charles was to have 10 acres, and $500 to be paid out of the real estate; and the remaining 50 acres was to be divided equally between John, Delos, and Matilda. The will stated that Ira and Hattie had received what was intended as their portion of the estate. The wife devised to her husband all her personal property absolutely, and the 40 acres during his life-time. At his death the land was to be divided equally between John, Delos, and Matilda.

It is the theory of the complainants' bill that these conveyances to Ira, John, and Charles, the payment of the $1,000 to Hattie, and the two wills, were intended by the father and mother as an equitable division of their property among their children; the whole shares of Delos and Matilda, and a portion of John's, being postponed in delivery until after the death of both parents. The evidence seems to support this theor-

It is also alleged in the bill that this disposition of the property was mutually agreed to by the father and mother, and that the inducement of Charles, Sr., to make his will as he did, was because of the promise of the defendant Ann Carmichael that she would make her will as she did; that each will was made and executed in pursuance of a mutual promise and agreement that each should be so made as aforesaid; and that, without said

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promise and agreement by the one to the other, neither of said wills would have been so made. This promise and agreement, if made, was in part an oral one.

Charles, Sr., died June 28, 1884. Up to this time neither of said wills had been revoked or altered, and both were in the possession of one William Mercer, with whom they were deposited soon after their execution. In the mean time no further advancements had been made to any of the children.

A few days after the death of their father, the children made an arrangement with their mother by which the personal property, about $3,600, was divided equally among them, they giving their obligations to her to pay her interest upon that sum while she lived.

Delos and Matilda resided away from their mother,—Matilda in Allegan county, and Delos out of the State. Hattie and Ira lived near to her.

August 14, 1884, the mother conveyed by warranty deed her 40 acres to Hattie and Charles Ira, and on the same day they deeded one-third of the same to Ira. These three on the same day gave the mother a life-lease of the same premises. These conveyances were all recorded on the day they were executed, but the register was requested not to have the fact of such execution and record published. It was nearly a year before the existence of these conveyances was discovered by the complainants. They then sought to settle the matter, and procure from Ira, Hattie, and Charles Ira a deed of the premises back to their mother, but were unable to do so. They then filed the bill in this cause.

The bill, after averring the facts, alleges that the defendant Ann Carmichael, at the time she deeded the property, was 78 years of age, old and feeble, both physically and mentally, and easily influenced; that the three

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beneficiaries of these conveyances, knowing her condition, conspired together to poison and prejudice her mind against the complainants, and to unduly influence her against them, in which conspiracy they succeeded, and operating fraudulently, and for the express purpose of cheating complainants out of their just rights under the said wills, obtained this deed to Hattie and Charles Ira without any consideration whatever; that the mind of their mother was so weak and open to undue influence that she was not competent to execute this conveyance, and was not fit to do business; that it was obtained by undue influence, and by false and untruthful statements; that she did not know at the time she executed the deed that Ira was to have any interest in the land, and never intended it; that said conveyance was obtained by fraud practiced upon said Ann Carmichael by Ira, Hattie, and Charles Ira, and that it was done to deprive complainants of their title to the same after the death of the said Ann; that the one-third interest was conveyed to Ira without the knowledge of the said Ann.

The complainants, therefore, pray that the deeds and the life-lease be set aside, and that injunction issue restraining said defendants from disposing of, transferring, or in any manner interfering with, said real estate, or any part thereof, and for such other relief as may be necessary to enforce and protect their rights in the premises.

The defendants admit receiving the property advanced to them about the time of the execution of the wills, and admit the execution of them, and the terms thereof, as set forth in the bill; but deny that said wills were made under any such understanding or agreement between their father and mother as claimed by the bill. They deny the incompetency of Ann to make the deed to Hattie and

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Charles Ira, and deny any fraud or undue influence in the execution of the same. They allege that Ann was fully competent to dispose of the said 40 acres of land, and that she conveyed the same of her own free will and accord, and in consideration of the care and kindness that said Hattie and Charles Ira had before that time bestowed upon her, and in further consideration that they should care for and support her as long as she lived.

The case was heard upon pleadings and proofs before Hon. Richard A. Watts, judge of the Hillsdale circuit, who found that the deed of Ann Carmichael to Hattie E. Disbrow and Charles Ira Carmichael was obtained by fraud and undue influence practiced upon her by the defendants Ira, Hattie, and Charles Ira, but felt compelled to deny relief to the complainants for two reasons:

1. Because he was not satisfied that the contract claimed to have been made between the father and mother as to their wills was established; and that such contract, if made out, being an oral one, "would be invalid and not enforcible; relating, as it did, largely to real estate, it would be void under the statute of frauds."

2. That the deed cannot be set aside because of undue influence and fraud in this suit, because the complainants have no such interest in the land in question as entitles them to relief; that, in order to vacate and set aside the conveyances complained of, proceedings must be taken in the interest and name of Ann Carmichael, or in the name of a guardian appointed to represent her interest.

He therefore dismissed complainants' bill without prejudice.

We fully agree with the circuit judge that the deed from Ann to Hattie and Charles Ira was procured by fraud and undue influence, and that Ann was not competent at that time to dispose of the land to any one.

We are further satisfied that the claim of complainants as to the contract is correct. We have no doubt from

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the two wills and their terms, and the oral evidence connecting them, that the father and mother came to a mutual understanding and agreement as claimed by the complainants; that the wills were made for the express purpose of securing to complainants an equal undivided share of 90 acres of land, incumbered with the $500 bequest to Charles, Jr.; that the making of one will was an inducement to the making of the other, and that the contract and inducement of the father has been carried out and performed by his death with his will executed and standing as he promised; that the children all knew of these wills, and the arrangement and purpose under which they were made. They acquiesced in it. They took possession of their share of the real estate, and have ever since held and enjoyed their respective shares, except Hattie, who took her $1,000 in lieu of land.

The complainants were put off in the enjoyment of their own until the death of the survivor of their parents. The mother to-day holds the use of 60 acres of land, and had all the personal property of her husband, by virtue of her agreement to will the 40 acres owned by her to the complainants. The fact that she made an arrangement by which she divided the personal property among all the children, and took back notes for the use of the same during her life, does not alter her condition. She had the property, and disposed of it as she saw fit, and disposed of it equitably. It has passed equally into the hands of the children, where it naturally would have belonged at her death. The will and contract of the father having been performed on his part with her, the children having acquiesced in the contract, and had their full share, can these defendants, Ira, Charles Ira, and Hattie, now, in fraud of the complainants' rights, acquire this 40 acres at Ann's death?

We think not. If they can, it must be because some narrow

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technicality stands in the way of justice. In the first place, the will of Ann stands. When she made the deed to Charles Ira and Hattie she was not mentally competent to destroy that instrument, even if the law would permit her to do so. There is no doubt but it is compe tent for a person to make a valid agreement binding himself to make a particular disposition of his property by last will and testament. *Faxton v. Faxon,* 28 Mich. 159; *Sword v. Keith,* 31 Id. 247; *DeMoss v. Robinson,* 46 Id. 62 (8 N. W. Rep. 712); *Mundy v. Foster,* 31 Id. 313, and note; *Johnson v. Hubbell,* 10 N. J. Eq. 322; *Van Duyne v. Vreeland,* 11 Id. 370, 12 Id. 142; Williams, Ex'rs (6th ed.), p. 14, and note, and pp. 162, 163.

But the defendants claim that the contract, resting partly in parol, is void under the statute of frauds, so far as it related to real estate.

It is to be remembered, however, that the contract on the part of the father has been fully performed, and that Ann Carmichael, the mother, has received and accepted the benefits of such performance. A court of equity, under these circumstances, will not permit her to rescind this contract. If this were an oral agreement to convey lands, there is performance enough shown on the part of the father, and acceptance by Ann, to authorize a decree for specific performance of such contract. And by the same principle that would govern in such a case, the performance of the contract in the present case upon the part of the father takes the agreement out of the statute of frauds. The non-fulfillment of this contract upon the part of Ann Carmichael would be a fraud which equity will not allow. Therefore it will decree the performance of the agreement upon Ann Carmichael, or take such steps as shall be necessary to prevent her from violating her part of the contract in fraud of the rights of these complainants. The complainants are not proceeding in

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this suit as heirs at law of Charles Carmichael, Sr., but as parties having a vested interest in this real estate under the contract of their father and mother, which agreement, having been fully performed by the father, will be enforced against the mother. They are therefore proper parties to this suit, and Ann Carmichael is a proper party defendant.

The decree of the court below will be reversed, with costs of both courts, and a decree entered here as prayed by complainants.

The other Justices concurred.

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EVERETT DOUGLASS AND HELEN SAGER v. AMANDA DOUGLASS ET AL.

Equity—Laches—Statute of limitations—Married women—Parol trust in lands.

1. It was held in *King v. Merritt*, 67 Mich. 217, that a married woman was relieved from all disability to bring action by the Legislature of 1855, being an act in regard to the rights of married women.
2. The rule that "equity aids the vigilant, and not those who slumber on their rights," is designed to promote diligence on the part of suitors; to discourage laches, by making it a bar to relief; and to prevent the enforcement of stale demands of all kinds, wholly independent of the statutory periods of limitation. 1 Pom. Eq. Jur. § 418.
3. A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. *Smith v. Clay*, 3 Brown, Ch. 639.
4. The purpose of How. Stat. § 6179, providing that no express

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trust in lands can rest in parol, is to preclude parties from asserting equitable interests in lands where they must rest upon parol evidence in opposition to the written instruments of title which have been made by their consent and approval.

5. Upon the facts stated in the opinion, it is held that, if complainants ever had any claim of title to the premises in controversy which they could have asserted against the defendants, it is now barred.

Appeal from Livingston. (Newton, J.) Argued June 8, 1888. Decided October 26, 1888.

Bill to set aside deeds and for other relief. Complainant Sager appeals. Decree dismissing bill affirmed. The facts are stated in the opinion.

Rollin H. Person, for complainant Helen Sager.

Luke S. Montague, for defendants.

LONG, J. The bill of complaint in this cause was filed by complainants to set aside three deeds,—one made by Alanson Douglass and wife to Myron Parker and Hiram Parker, dated November 2, 1857; one made by Myron Parker and Hiram Parker and their wives to Amanda Douglass, dated November 5, 1863; and the other made by Amanda Douglass to Sarah T. Parker, dated November 5, 1863,—conveying 240 acres of land in the township of Iosco, in the county of Livingston, and praying that each of said complainants be decreed an undivided three-tenths of said premises, and for an accounting for the rents and profits of the premises.

The adult defendants, Amanda Douglass and Mary Parker, filed an answer to the bill, and the infant defendants, Emma Parker and Everett Parker, by guardian *ad litem* filed an answer setting forth the same facts of defense as those set forth in the answer of the adult defendants. Proofs were taken before a commissioner upon the issue in the case, and a hearing had thereon

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before said court, and a decree was entered therein dismissing the bill, from which decree the complainant Helen Sager alone appeals.

The complainants are brother and sister, and children of Amanda Douglass, one of the defendants. The bill alleges that their father, Samuel B. Douglass, was the owner in fee, and in the actual possession during his life-time, of the N. E. ¼, and the E. ½ of the N. W. ¼, of section 17, in township 2 N., of range 3 E., in the county of Livingston, State of Michigan, containing 240 acres of land; that for several years Samuel B. Douglass, with his family, lived upon the premises, and made large improvements on the lands; that on the 7th day of June, 1844, Samuel B. Douglass was in embarrassed circumstances, and for the purpose of raising the money to pay off such indebtedness he made a loan of $350 from his brother, Alanson Douglass, and to secure the payment of the same gave his brother a lien upon certain personal property, and also made and delivered to him a quitclaim deed of the lands above described for a consideration therein expressed of $2,000, and which deed was recorded in the office of the register of deeds of Livingston county on January 1, 1845.

It is further alleged that Alanson Douglass at the same time executed and delivered to Samuel B. a contract in writing, wherein it is alleged that said quitclaim deed was given for the purpose of securing the payment of of said loan only, and not as an absolute transfer of the title of said premises to said Alanson Douglass, and agreeing, upon payment to him of said money and the interest and expenses of such conveyance, that he (Alanson) would reconvey said property upon request of Samuel B. to him or to any one he should appoint by assignment, but not otherwise.

That this deed, and agreement executed by Alanson,

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were intended by the parties as a mortgage, and not intended to convey, transfer, or pass the title absolutely to said premises to Alanson Douglass; and that no foreclosure or attempt at foreclosure of said deed has ever taken place. It is further alleged that Samuel B. Douglass departed this life intestate at Detroit, on September 11, 1847, leaving surviving him as his heirs at law, Everett Douglass, Robert Douglass, Samuel B. Douglass, Jr., and Helen Douglass, now Helen Sager, and Sarah Douglass, afterwards Sarah Parker, and the defendant Amanda Douglass as his widow.

That since the death of said Samuel B. Douglass, said Samuel B. Douglass, Jr., and Robert Douglass have departed this life, and that the surviving children and the widow took the interest which said deceased children had in the estate of their father.

The bill further alleges that Sarah Douglass intermarried with one Myron Parker, and that on the 14th day of July, 1873, she departed this life intestate, leaving as her sole heirs at law her surviving, Mary Parker, Emma Parker, and Everett Parker, the three defendants named in the bill. And complainants further aver in their bill that soon after the death of their father said complainant Everett Douglass went upon said premises, and occupied and worked them, jointly with his mother, Amanda Douglass, and so continued to occupy and possess the same for several years after his father's death.

That during the year 1854 complainant Everett Douglass and his mother, Amanda Douglass, with the proceeds of said premises, and other means which they had earned and accumulated, paid in full said Alanson Douglass the amount, principal and interest, of the sum so borrowed of him by Samuel B. Douglass, deceased, and to secure payment of which said quitclaim deed was executed as aforesaid by Samuel B. Douglass to Alanson Douglass;

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and that Alanson was entirely satisfied with such payment, and willing to execute any proper release or conveyance that would vest the title of said first above described lands and premises in the widow and heirs at law of Samuel B. Douglass, deceased.

That upon the payment of said amount so secured by said quitclaim deed, on or about the 11th of September, 1854, said Alanson Douglass made, executed, and delivered a deed of conveyance of said first described lands and premises to Amanda Douglass, thereby conveying to her all the right, title, interest, claim, and demand which he, the said Alanson, had in and to said premises under and by virtue of said quitclaim deed, or under and by virtue of any title, claim, or demand whatever. And they charge that no consideration was paid by said Amanda for the last-named deed, except to pay the amount, principal and interest, and costs, so secured by said quitclaim deed.

Complainants further aver that they consented at the time to have the said last-named deed so executed by said Alanson to said Amanda for the sole and only purpose of having the title to said lands and premises vested in their said mother, so that she and the said heirs at law of Samuel B. Douglass could secure their rights as such heirs and as the heirs of said Amanda in and to said premises upon the death of their said mother.

That at the time said last-named deed was executed and delivered to said Amanda, it was their intention to permit her undisturbed to possess and occupy said lands and premises for and during her natural life, fully believing that at her death they would each inherit an undivided third thereof. And they aver that they would not now interrupt the peaceable possession of said Amanda to said premises, or commence these proceedings against her to recover and secure their rights thereto, if it were not for

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the acts and conduct of said Amanda, and the pretended deeds of conveyance of said premises by her executed, as hereinafter set forth; by means of which acts, conduct, and pretended conveyances said Amanda intended and undertook to cheat and defraud the complainants out of their title, share, and interest in and to said lands as such heirs of said Samuel B. Douglass, and in violation of her understanding and agreement to and with complainants at and before said deed was so executed and delivered to her by said Alanson Douglass.

And they charge that the last-mentioned deed never was recorded, but ever remained in the possession of the said Amanda for a long space of time, to wit, until on or about the 2d of November, 1857, when it was by said Amanda, or under her direction, destroyed, and that immediately thereafter said Amanda caused another deed to be executed and delivered by said Alanson to Myron and Hiram Parker of said premises.

That said Hiram Parker was not related to them or to the said Amanda, but was the brother of said Myron Parker, the husband of Sarah, the daughter of said Amanda, and the father of said minor children, defendants herein.

That no consideration whatever was paid for said last-mentioned deed, and that the same was executed and delivered on some private or secret agreement or understanding between said Amanda and the said Parkers; that said deed from said Alanson was executed and delivered to them upon request of said Amanda, with the agreement and understanding that they, the said Myron and Hiram Parker, would execute and deliver to her a deed of conveyance of said lands and premises, and thereby convey to her all the pretended title, interest, or claim which they or either of them had in said premises; and that, having received such deed from said Alanson, they

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refused to execute and deliver to said Amanda their deed, unless she would at the same time and place execute and deliver to said Sarah Parker, the wife of Myron Parker, a deed of conveyance of said premises, thereby conveying to said Sarah all the real and pretended title in and to said premises which she, said Amanda, then had.

It is further alleged that on the 5th of November, 1863, said Myron Parker, and Sarah, his wife, and Hiram Parker, made, executed, and delivered to said Amanda a deed to said premises, and that upon the same day said Amanda made, executed, and delivered her deed to Sarah Parker, thereby conveying to her all her right, title, and interest in and to said premises, thereby vesting the title to said premises in said Sarah Parker; and that by the death of said Sarah Parker the defendants Mary Parker, Emma Parker, and Everett Parker took whatever interest their mother had in said premises, and now claim to be the owners of the same.

That said premises are worth the sum of $14,000 and upwards, and that the share of said complainants each therein then was and still is worth the sum of $4,000 and upwards.

That since the death of said Samuel B. Douglass, said Amanda, as his widow, has lived upon said premises; has ever since his death continued in possession of the same, and used and farmed the same, and had the proceeds thereof, undisturbed by the complainants or any of the heirs at law of Samuel B. Douglass deceased, without requiring any accounting therefor by her and said heirs. And they aver that no accounting by her, or assignment of her dower interest in said lands, ever took place; that since the date of said deed to Sarah, and during her life-time, sometimes said Amanda has claimed that said real estate belonged to said Sarah, and has, since the death of said Sarah, claimed that said real estate belonged to the

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said children and heirs at law of said Sarah. Said Amanda has repeatedly denied—since the death of said Sarah, but never before—that said complainants had any interest whatever in said real estate as heirs at law of Samuel B. Douglass or otherwise. She now claims that the heirs at law of said Sarah are the owners of said premises, and that they became such owners under and by virtue of said deed from Alanson to Myron and Hiram Parker, and from them to said Amanda Douglass, and from said Amanda Douglass to said Sarah Parker, and by inheritance as heirs at law of said Sarah, deceased; and said Amanda utterly denies any title, interest, or right of possession in and to said premises, or any part thereof, to the complainants or either of them.

The complainants aver that they never sold or conveyed or in any way parted with their interest in said real estate; and they charge, as heirs at law of Samuel B. Douglass, Sr., Samuel B. Douglass, Jr., and Robert Douglass, deceased, they are now tenants in common of, in, and to said real estate with said Amanda, and the said Sarah until the death of the latter; and since the death of said Sarah they aver they have been such tenants in common of said premises with said Amanda and the said children and heirs at law of said Sarah.

The bill then prays that said pretended sale and deed from said Alanson Douglass to Myron Parker and Hiram Parker, and said pretended sale and deed from said Myron Parker, Sarah Parker, and Hiram Parker to said Amanda Douglass, and said pretended sale and deed from said Amanda Douglass to said Sarah Parker, all and each of them, may be decreed to be null and void, and the same be held for naught as against the complainants; and that complainants be reinstated in their undivided three-tenths interest, each, in said real estate, as above described, excepting four small pieces in the bill described; and that

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the defendants hereto, or such of them as may seem to have appropriated the same, be liable therefor, and may be requested to render an account, and pay over to the complainants, each, his or her share of the rents and profits arising from said lands since the death of said Samuel B. Douglass; and that Amanda Douglass, Mary Parker, Emma Parker, and Everett Parker, or such of them as may appear to have the apparent legal title or any title thereto, may be decreed by the court to release and convey said lands and premises, or such undivided interest therein, to the complainants as their and each of their interest in said premises may appear; or that said decree may stand in lieu of such release and conveyance, and may be recorded for that purpose.

The answer admits the giving of the deed to Alanson, and the making of the agreement, but it avers it was understood and believed by the parties to be a valid conveyance of the title, and that the agreement was a memorandum contract for a reconveyance of the land, and did not, with the deed, constitute a mortgage, legally required to be foreclosed to pass the title, and was not so intended by the parties.

That Amanda Douglass never saw, knew, or heard of such an agreement until about the year 1872; and denies that on the death of the other children, or at any time, the title to the premises passed to the complainants.

The answer admits the conveyances by Alanson and Amanda to the Parkers, and their record; but avers they were made by authority, and that it was understood by the parties who made them, the entire family and neighbors, that they had authority to convey. It admits that complainants all consented to the deed to Amanda, but denies that there was any agreement or understanding that she should hold possession of the premises during her lifetime, and then that they should descend to the heirs of

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Samuel B. Douglass; and avers that, after the deed to her, Amanda never recognized any title of complainants to said premises, and that there was no sufficient consideration for said deed; that it was made to vest the title in her; and it avers the complainants were more than paid for all done by them.

That before the death of Samuel the personal property on the farm had been sold upon execution levy; that at the time of his death he was indebted upon mortgages and other indebtedness in the sum of $4,000; that Amanda worked the premises by consent of Alanson, and by her own efforts and industry raised off said premises enough money to pay up part of the mortgage indebtedness upon the premises in controversy, and also paid Alanson; that on September 11, 1854, $1,000 was paid to Alanson by herself and complainant Everett, she borrowing half of it of Everett, who had obtained it from the sale of lands which came to him by his father, S. B. Douglass, in his life-time; that a deed was made at the same time to Everett by Alanson of the land covered by the McIntosh mortgage, which was assigned to Alanson at the time of the deed to him, which title he had obtained after the death of S. B. Douglass; that it was then the understanding that Amanda became the owner of the premises in controversy, and Everett of the McIntosh lands, which he sold a year or two afterwards, and had the proceeds of.

That Amanda, with full knowledge of the complainants, continued in possession of the premises, claiming to own them under her deed from Alanson, until 1857, when the mortgage held by one Lewis Benedict, on what is called the "Grover Land," but distinct from the land in controversy, was claimed to be insufficient security, and administration was threatened against the estate of S. B. Douglass, deceased, for the purpose of collecting the deficiency upon the mortgage, which was then in process

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of foreclosure; that by advice of Judge Whipple, the deed to Amanda, which was not put upon record by accidental omission, was destroyed, or returned to said Alanson by her request, and a deed was then made by Alanson, on November 2, 1857, to Myron and Hiram Parker for a time, until the Benedict matter could be settled up, and a mortgage given back, covering some actual indebtedness to Alanson, for the purpose, as Whipple advised, to avoid an expensive litigation, as she was poor, and unable to litigate with as wealthy a man as Benedict; that this was all understood by the family, including the complainants.

That on the Benedict foreclosure there was a deficiency of $2,344.36, which Amanda finally settled by conveying her dower interest in the Grover lands, 255 acres, to Benedict; the mortgage having never been signed by her.

That, all the claims against the estate having been settled up by her, on the 5th of November, 1863, the Parkers conveyed the premises back to Amanda; and that she of her own free will conveyed the premises to her daughter, Sarah D. Parker, taking back a life-lease of the premises, which was part of the consideration for the deed; the balance being for the purpose of providing for said Sarah D. Parker, she having received nothing from her father's estate or her mother, and the complainants having been well provided for, and having received as much in all as did Sarah.

That the deeds mentioned were recorded soon after their execution, and were public records, which was well known by the family, including the complainants, and the neighbors; that the possession from 1854 to the present has been adverse to the complainants, and that the title of the defendants is perfect and absolute in said premises; that there was no fraud or conspiracy in the making of such conveyances; that the profits of said farm went to pay the debts of S. B. Douglass, deceased, and that

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Amanda Douglass has a life-estate in said premises, and the other defendants are owners in fee, and the complainants have no interest in the premises, which has always been claimed by Amanda; that the bill shows that the complainants are not in possession of the premises, and that the bill will not lie if they have an adequate legal remedy.

On the hearing the circuit judge made a decree dismissing the bill, with costs against the complainants, and from this decree Helen Sager alone appeals.

The bill in this cause was filed in May, 1884. The deed from Alanson to Amanda Douglass was made and delivered on the 11th of September, 1854. Nearly thirty years had elapsed from the time of the delivery of this deed before the bill in this cause was filed. The second deed made by Alanson Douglass—the one conveying the premises to Myron Parker and Hiram Parker—was made in November, 1857, about 27 years prior to the filing of the bill of complaint in this cause. During all those years the defendant Amanda Douglass has occupied these premises, and claimed possession thereof under the life-lease made and executed to her by her daughter, Sarah Parker; the title of record standing in Sarah D. Parker, and, since her decease, in her children, Mary Parker, Emma Parker, and Everett Parker, the three other defendants.

The bill avers that the complainants consented to the making of the deed by Alanson to their mother, Amanda Douglass, thereby conveying the absolute title to her of the premises in controversy.

During these years the complainant Helen Sager has lived in the immediate vicinity of the premises, and it appears from the proofs taken that she knew of the execution of the deed from Alanson Douglass to Myron and Hiram Parker, and from them and their wives to Amanda

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Douglass, and from Amanda Douglass to Sarah Parker; said deeds being placed upon record immediately after their execution. She was informed, as shown by the proofs taken in the case, of the agreement between her mother and Everett Douglass as to the McIntosh farm, and she was bound to know that the lands which formerly belonged to her father were claimed to be conveyed independent of the statute of descents. With full knowledge of these facts she has rested upon her rights for more than twenty years.

It is claimed, however, by her counsel, that the statute of limitations would not run against Mrs. Sager, from the fact that she was married while an infant, and has always been a married woman since. This question is fully settled by this Court in *King v. Merritt*, 67 Mich. 217 (34 N. W. Rep. 700), in which it was held that a married woman was relieved from all disability to bring action by the Legislature of 1855, being an act in regard to the rights of married women.

"Equity aids the vigilant; not those who slumber on their rights."

This rule is designed to promote diligence on the part of suitors; to discourage laches, by making it a bar to relief; and to prevent the enforcement of stale demands of all kinds, wholly independent of the statutory periods of limitation. 1 Pom. Eq. Jur. § 418. The rule is well stated by Lord Camden in *Smith v. Clay*, 3 Brown, Ch. 639:

"A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence."

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The deed from Alanson Douglass to Amanda, made in 1854, conveyed to her an absolute title in fee to the premises. It was made by consent of all the heirs at law of Samuel B. Douglass. It was in the usual form of quitclaim deeds, without any clause in it, so far as this record shows, limiting the estate of Amanda Douglass in any way, and was not accompanied by any written declaration of trust, or agreement of any character to convey to the heirs at law of Samuel B. Douglass, or to preserve the estate for their use and benefit after her death. The claim is made by the complainants that such an agreement was made; that the estate was to be kept and enjoyed by Amanda during her life-time under the deed of 1854 from Alanson, and that at the death of Amanda it was to pass under the statute of descents to her heirs at law. This agreement rested in parol. No express trust in lands, however, can rest in parol. How. Stat. § 6179.

The purpose of this statute is to preclude parties from asserting equitable interests in lands where they must rest upon parol evidence in opposition to the written instruments of title which have been made by their consent and approval. If the complainants ever had any claim of title to the premises in controversy which they could have asserted against Amanda Douglass, or these infant defendants, it is now barred.

We do not think the proofs made out any claim for relief, and complainants' bill was properly dismissed in the court below.

The decree of the court below is affirmed, with costs to defendant.

The other Justices concurred.

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NELSON MILLS AND BARNEY MILLS v. THE TOWNSHIP OF RICHLAND.

Taxes—Legality of action by officers—Evidence—Board of review—Division of township—"Ordinary expenses" of township—Payment of tax under protest.

1. Every essential proceeding in the course of a tax levy must be taken in conformity to the requirements of law; but the evidence whether or not this has been done is only such as is required to prove similar facts in other cases.
2. Whenever the law requires written evidence of the action taken by officers in tax proceedings, the record becomes the only legal and proper evidence of these facts; but this does not exclude entirely the usual presumptions in favor of the regularity and honesty of official action.
3. A certificate upon the assessment roll signed by the supervisor, and one of the members of the board of review appointed by the town board, and by one not so appointed, sufficiently shows that a legally constituted quorum existed and reviewed the roll.
4. In a suit to recover taxes alleged to have been illegally assessed, the question of the legality of a division of the township by the board of supervisors cannot be inquired into.
5. The "ordinary expenses" of a township can never include less than the necessary expenses incurred in administering the government of the township, under the statutes creating it and relating thereto, in such manner as will best promote the convenience, peace, health, prosperity, and happiness of the people residing therein.
6. A liquidated indebtedness due on the division of a township to the new township, and the special or contingent fund to meet such exigencies as cannot be foreseen, and which may arise at any time in conducting township affairs, requiring the use of money, are included in "ordinary expenses," and are such as the town board may vote to raise on the neglect or refusal of the electors to do so.
7. Expenses incurred in establishing lost section corners, and in building a town-hall, are not included within the "ordinary expenses" of the township, and should be provided for by a vote of the electors, and not of the town board.

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8. Under How. Stat. §§ 1326, 1327, the money tax authorized to be raised, for highway purposes, not exceeding 50 cents on the $100 valuation, should be spread according to the assessed valuation of the *preceding* year.

9. Payment of taxes assessed on real estate, made prior to January under a specific protest, as provided by the tax law of 1882, is not a voluntary payment. *Iron Co. v. Crystal Falls*, 60 Mich. 80 (head-note 3).

Error to Ogemaw. (Tuttle, J.) Argued June 15, 1888. Decided October 26, 1888.

Assumpsit to recover taxes paid under protest. Plaintiffs bring error. Reversed. The facts are stated in the opinion.

Elliott G. Stevenson, for appellants.

[The points of counsel are stated in the opinion.—REPORTER.]

Markey & Hall, for defendant, contended:

1. The payment was voluntary, the treasurer having no power to enforce collection when it was made; citing Act No. 9, Laws of 1882, § 31; *Iron Co. v. Crystal Falls*, 60 Mich. 79.

2. Official action is presumed to be regular; citing *Allen v. Mills*, 26 Mich. 126; *Saunders v. Mfg. Co.*, 27 Id. 523; *Morse v. Hewitt*, 28 Id. 485; *Blair v. Compton*, 33 Id. 414; *Wood v. Thomas*, 38 Id. 686; *Smith v. Rich.*, 37 Id. 549.

3. Supervisors act judicially in assessing property; citing *Wall v. Trumbull*, 16 Mich. 236; *Merrill v. Auditor General*, 24 Id. 172.

4. The grounds of illegality must be specifically set forth in the protest, and the proof be limited to these grounds; citing tax law of 1882, § 42; *Iron Co. v. Crystal Falls*, 60 Mich. 79, 510.

5. The action of the board of supervisors in organizing the new township was political in its nature, and cannot be reviewed by the Court in this action; citing *Attorney General v. Supervisors*, 33 Mich. 290; *Attorney General v. Page*, 38 Id. 286; *Scrafford v. Supervisors*, 41 Id. 647; *Clement v. Everest*, 29 Id. 19.

6. The declaration is not full or specific, and the defendant is

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neither in it nor in the protest sufficiently apprised of the grounds of the alleged illegality that will be insisted on; citing *Beaubien v. Cicotte*, 8 Mich. 12.

7. The objection that a declaration fails to state a cause of action is not waived by pleading to the merits and going to trial; citing *Stoflet v. Marker*, 34 Mich. 313; *Jamison v. Haire*, 29 Id. 207.

SHERWOOD, C. J. The plaintiffs sued the township of Richland, in the county of Ogemaw, to recover back taxes paid by them under protest in the month of December, 1884. The claimed assessment was made under the law of 1882 for the taxes of 1884. The plaintiffs contest the validity of the tax upon two grounds:

1. The plaintiffs claim no valid assessment of their property was made on which to base the levy of taxes for the year 1884, and which are in controversy in this suit.

2. That there was no authority for spreading as part of the township tax the $1,500 voted to be raised that year by the township board at a meeting thereof held on the 27th of August, 1884.

In regard to the first ground the statute provides:

"SEC. 12. It shall be the duty of each supervisor, as soon as possible after entering on the duties of his office, to ascertain the taxable property of his township, and the persons to whom it should be assessed, and their residences. * * * * * * * * *

"SEC. 15. On or before the third Monday of May in each year the supervisor shall make and complete an assessment roll, upon which he shall set down the name of every person liable to be taxed for personal property in his township, and also a full description of all the real property liable to be taxed in such township. * * *

"The supervisor shall estimate, according to his best information and judgment, the true cash value of every parcel of real property, and set the same down opposite such parcel. He shall also estimate the true cash value of all the personal property of each person, and set the same down opposite the name of such person."

Section 17 defines what is meant by the term "true cash value," as used in these sections, to be, in effect,

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the usual selling price at the place where the property shall be at the time of the assessment,—the price which could be obtained therefor at private sale, and not at forced or auction sale.

The *first* step, then, in the proceedings necessary to be taken to make a valid assessment upon which to base a valid levy of taxes, is the listing by the supervisor of all the taxable property in his township.

Second, To estimate the same at its true cash value,—what could be obtained therefor at private sale, and not at forced or auction sale.

It is claimed by plaintiffs' counsel, in the case under consideration, that there was nothing whatever to indicate the method adopted by the supervisor in making the assessment of the property within his township, or to show whether he followed the rule laid down for his guidance by the law in following the same. It is true, as contended by counsel for the plaintiffs, that every essential proceeding in the course of a levy of taxes must be taken in conformity to the requirements of law; but the evidence whether or not this has been done is only such as is required to prove similar facts in other cases; and wherever, in such case, the law requires written evidence of the action taken by officers in making such assessments and levy, the record becomes the only legal and proper evidence of these facts; but, while the proofs of such action and proceedings taken should be made from the record, this does not exclude entirely the usual presumptions of the regularity of official action, and the honest purposes of officers whose duty it is to take the required action, in the proofs to be made.

It is urged, as an objection to the assessment, that Creaver and Van Allen were appointed to serve as members of the board of review, while the assessment roll appears to have been reviewed by the board composed of

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the supervisor and two justices of the peace of the township of Richland; and it is also further objected to the validity of the assessment roll that the property listed by the supervisor for assessment only contained that of town 21—4, and not that of town 21—3, which plaintiffs claimed had not been legally detached; and it is upon the grounds now mentioned that plaintiffs' counsel claims the assessment is invalid.

The record shows that up to January, 1884, the township of Richland was composed of the territory of two governmental towns, and in that month it was divided by the board of supervisors; and the west part thereof, viz., town 21—3, was called the township of Mills, and so set apart and organized by the board of supervisors of Ogemaw county. If this was legally done, then the supervisor of Richland could not carry on to his roll the lands contained in Mills. Whether or not such action of the board of supervisors was legal cannot now be determined in this action. We see no objection to the roll on that ground.

We must presume that the persons appointed to serve as members of the board of review did serve. The record shows the appointment of one, who, with the supervisor and a Mr. Chapel, sign, as the board of review, an indorsement on the assessment roll; saying,—

"Assessment roll for the township of Richland for the year 1884, as approved by the board of review."

The statute expressly provides that the township board may fill any vacancies which occur in the board of review, which consist of three, the supervisor and two others, to be appointed by the township board, and a majority of whom constitute a quorum. We think it sufficiently appears that a legally constituted quorum existed and reviewed the assessment roll, and that the objection of

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plaintiffs' counsel to this portion of the proceedings is not well taken.

There remains to be considered the objections of plaintiffs to the township and highway taxes for 1884. It is claimed these were excessive and unauthorized. The protest was sufficiently specific, we think, to enable the plaintiffs to be heard in this action, and allow them to recover if their claim of illegality in the amounts collected and want of authority shall be found sustained.

The township tax for that year consisted of the following items, as voted: To pay outstanding orders issued by the township board and highway commissioners of the township, $891.10; also the further sum for contingent expenses, $800. These sums were voted at the annual meeting in April, 1884; and it was further voted that for highway labor there should be assessed one-half day upon each $100 of valuation; also—

"A money tax of fifty cents upon each $100 of valuation, according to the assessment roll of 1883, for highway purposes."

The record further shows that at a meeting of the township board held on the 27th day of August, 1884, the following preamble and resolution were adopted:

"*Whereas,* it appears to us that at the annual township meeting of Richland held on the 7th day of April, 1884, the electors neglected to vote such sum of money as was necessary to defray the ordinary expenses of said township; now, therefore, at a regular meeting of said township board held therein on the 27th day of August, 1884, the sum of $1,500 is hereby voted by us to be raised by tax upon the taxable property in the said township for the purpose aforesaid; and be it further resolved that the money raised by the above resolution be apportioned and divided as follows:

"Pay the sum raised for the establishment of lost section corners, $250.00; for building town-hall $250.00, this money having been borrowed by the township board for the payment of contingent orders; and for the payment

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of the order drawn in favor of the treasurer of the township of Mills in payment, as per settlement with Richland, $557.98; the remainder for special fund, $467.02,—making the total amount voted for township tax, $3,191.10."

This last-named sum was spread upon the roll for 1884, and the amount thereof assessed against the property of the plaintiffs, and of which they paid, under protest, $2,319.96, and which sum is now contested.

Fifteen hundred dollars of this sum was voted by the township board on the 27th of August. The township had the power, and it was its duty, by a vote of the electors, to vote all sums necessary to pay its outstanding legal indebtedness, as well as all sums necessary to defray its ordinary expenses, not exceeding the sums limited by law. If the township shall refuse or neglect to vote, at the township meeting, the necessary sums to defray the ordinary expenses, the township board may at any regular meeting vote the necessary sums for that purpose. See How. Stat. §§ 671, 750.

It will be noticed that the purpose for which the township board may vote to raise money is confined to the ordinary expenses of the township, and can then only do so when the township electors have failed or neglected to take such action. The purposes for which the town board in the present case voted the $1,500 were—

"1. To pay for establishing lost section corners.

"2. To pay for building a town-hall; this money having been borrowed for that purpose.

"3. For the payment of indebtedness of the township of Richland to town of Mills, on division of the township.

"4. The remainder, amounting to $467.02, for a special fund."

What shall be deemed as the ordinary expenses of a township is a question which has never received any very satisfactory answer, and it would be difficult to glean one from what has been said in this Court. I think, however,

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it may well be said the answer can never include less than the necessary expenses incurred in administering the government of the township, under the statutes creating it and relating thereto, in such manner as will best promote the convenience, peace, health, prosperity, and happiness of the people residing therein. This would, as has been held by this Court in *Marathon v. Oregon*, 8 Mich. 382, include the payment of the indebtedness to the township of Mills; also the special or contingent fund to meet such exigencies as cannot be forseen, and which may arise at any time in conducting the affairs of a township, requiring the use of money. Both of these are included in ordinary expenses, and are such as the town board may vote in the contingency provided by statute, and which the record shows *prima facie* existed in this case.

But I do not think that expenses incurred in establishing lost section corners belong to that class of expenses; and when authorized it should be by a vote of the electors of the township, as is required in cases of other than ordinary expenses. Indeed, the statute requires this to be done. It says (see How. Stat. § 509):

"The boards of supervisors of the several counties are hereby authorized to establish and perpetuate any government section corners or quarter-posts in their respective counties which they may have good reason to believe are lost, or are in danger of being lost, by the employment of a surveyor therefor: * * * * * * * * *

"*Provided*, That such work shall be done only in such townships where a majority of the voters voting shall vote to raise such sum as is required, not exceeding $250 from any one township."

This section authorizes the board of supervisors to establish and perpetuate section corners or quarter-posts in their counties which they have good reason to believe are lost, by the employment of a surveyor therefor. It does not contemplate that the township board, upon its

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own responsibility, may undertake to raise money, and expend the same for the purposes stated, as was attempted to be done here.

Neither do the ordinary expenses of a township include those incurred in building a town-hall, for the public gathering of the citizens, whether in whole or in part for the use of the town.

Section 672, How. Stat., governs the proceedings to be had looking to the levy of a tax for the purpose of defraying the expenses of erecting a town-hall, and prohibits the raising of a tax for such purpose, except when the qualified electors of the township vote to raise the same at a legal meeting, after a notice of the intention to move for such vote and appropriation, signed by at least twelve freeholders, and posted in five of the most public places in the township at least ten days before the time of such meeting, and providing the vote at such meeting upon such question shall be by ballot. There is no evidence or finding in the case that in either of the last two cases any of the legal steps were taken which were precedent to the levy of the tax or assessment of the same, and the tax against the plaintiffs' lands for those purposes cannot be sustained.

The highway tax of 50 cents on $100, voted at the spring election, was spread upon the valuation of plaintiffs' land according to the assessed value in 1884. The plaintiffs insist it should have been spread according to the assessed value in 1883, and that such illegal assessment compelled them to pay $109 more than they ought to have paid. This excess is substantially conceded by the defendant's counsel if plaintiffs' views of the statute are sustained. I think from the reading of sections 1326 and 1327 of Howell's Statutes the plaintiffs' construction is the correct one, and the assessment in this regard was excessive, as claimed.

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The circuit judge held under his findings and the circumstances of the case, the payment made to the treasurer of the taxes against the plaintiffs was voluntary, and therefore he could not recover. In this the court was in error. Laws of 1882, § 42, p. 20; *Peninsular Iron, etc., Co. v. Township of Crystal Falls*, 60 Mich. 79, 510 (26 N. W. Rep. 840, and 27 Id. 666); *White v. Millbrook*, Id. 532 (27 N. W. Rep. 674).

It nowhere appears that the electors, who were the persons to decide by their votes upon the tax to build the town-hall, and to restore lost section corners, ever voted to impose any such tax for such purposes.

If the plaintiffs are entitled to recover at all, it is because the township has money in its treasury, and under its control, which belongs to them; and the objection of defendant's counsel to the declaration, that it is not sufficiently specific, is not well taken. It states the money was paid to the town under protest, which the township received, and to which it was never entitled.

The judgment, for the reasons above stated, must be reversed, with costs, and a new trial granted.

CHAMPLIN, MORSE, and CAMPBELL, JJ., concurred. LONG, J., did not sit.

JOHN C. GOODRICH, GUARDIAN OF JESSE W. REED, v. ELLA E. SHAW.

Deed—Mental incompetency of grantor—Duress.

The deed sought to be set aside is held to have been procured through threats, in executing which the grantor acted under a species of duress, and the relief prayed for is granted.

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Appeal from Wayne. (Hosmer, J.) Argued June 21, 1888. Decided October 26, 1888.

Bill to set aside a deed, etc. Complainant appeals. Decree reversed, and one entered granting relief as prayed. The facts are stated in the opinion.

Levi T. Griffin, for complainant.

John Atkinson, for defendant.

[Briefs are confined to a discussion of the testimony.—REPORTER.]

SHERWOOD, C. J. The complainant is the guardian of Jesse W. Reed, an alleged incompetent person, 76 years of age, who resides in Detroit.

The defendant is a young girl, now 14 years old, and a niece of Reed's third wife, who died in April, 1886. The girl lived in Reed's family, with her mother, for a short time before Mrs. Reed died, and was familiar and intimate in Reed's family for about two years before the death of Mrs. Reed. During this period it is alleged that Jesse W. Reed took undue liberties with the girl, and it is claimed by her counsel it was on account of this wrong and injury to her that he was induced to give to her, and did actually convey to the defendant, by warranty deed on the 30th of April, 1886, two lots on the Cass farm, in Detroit, which he values at from $9,000 to $12,000.

On the 22d day of July, 1886, the complainant was appointed guardian for Mr. Reed by the probate court of Wayne county, and now brings this suit to restrain the defendant by injunction from in any way disposing of the property, and to obtain a decree declaring the defendant a trustee of the property for the complainant as guardian of Mr. Reed, and that she be directed to deliver

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up the deed to be canceled, and convey the property to the complainant or to his said ward.

To the bill of complaint the defendant, by her mother, Martha I. Reed, as guardian *ad litem,* made answer as follows:

"This defendant, answering by her said guardian, saith that she is an infant of the age of fourteen years or thereabouts, and she therefore submits her rights and interests in the matters in question in this cause to the protection of this honorable court; hereby denying all material allegations in said bill, and putting complainant to proof thereof."

The case was heard on the pleadings and proofs, and the circuit judge dismissed the complainant's bill. The guardian for Reed appeals to this Court.

It was set up in the bill, and it was claimed by complainant that the proofs show:

"1. That there was no valuable consideration for this valuable property ever given by defendant.

"2. That there was no such relation between Jesse W. Reed and the defendant Shaw as to support a consideration of love and affection.

"3. That Jesse W. was old and infirm of body and mind, and not competent to execute a deed.

"4. Whether he was competent or not, if properly aided in the transaction of his business, it is certain that he was so infirm of purpose and weak in mind that he was easily operated upon, and persuaded, under the influence of threats, to execute the instrument."

An examination of the record has convinced us that this claim of the complainant is supported by the testimony, and ought to have controlled in the decision at the circuit.

We shall not attempt a review of the testimony in this opinion. The questions presented were almost entirely those relating to the facts, and such review could serve no useful purpose, and would be of interest only to those who are immediately interested in the litigation.

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If what Mr. Reed says is true as to the alleged injury to the girl, it could amount to no more than an assault and battery, committed in the presence of the mother, and without her objection or disapproval. His physical condition, as the testimony presents it, tends strongly to show that he could not have been guilty of the conduct towards the defendant intimated by the mother, and claimed to have occurred by defendant's counsel, and which is made the basis of the settlement, which sufficiently appears to have been the only consideration for the deed.

Was this settlement brought about, and Reed's consent thereto obtained, which resulted in his giving the deed in question, by means of fear of prosecution and criminal punishment in the penitentiary, to which he never would have assented or yielded had not his mind been so weakened, and his judgment impaired, by physical infirmities and extreme old age, as to render him incapable of intelligent comprehension of the situation and the exercise of his reason and the judgment which he otherwise would have used, in resisting what he claimed to be a false charge made against him and in protecting his property? This is the only remaining question in the case.

If the affirmative of this question gives correctly the situation of this unfortunate old man, then our duty is plain. We should afford such relief as is necessary to enable the complainant to secure for the use of his ward the property he accumulated during his early life, to meet the necessities which have come upon him by reason of his physical maladies and mental misfortunes in his old age. If the law should fail to do this, it would be unworthy of the recognition of courts in any country where civilization prevails

We think the facts which are legitimately in evidence in this case clearly show that this old man in making the

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deed in question was so far influenced by fear from the threats made against him by defendant's mother, by reason of his mental weakness and loss of judgment, as to be incapable of exercising his reason, or to understand or have any intelligent comprehension of what he was doing; that he acted under a species of duress, brought to bear upon him by such threats; and it would be most unjust to allow the transaction to stand.

The complainant is entitled to the relief he asks for his ward.

The decree at the circuit will therefore be reversed and set aside, and a new decree entered in that court in favor of complainant, in accordance with the prayer of his bill, but without costs.

The other Justices concurred.

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107 421

CLARENCE O. NEWKIRK v. HENRY FISHER.

Taxes—Return of land by treasurer essential to a valid sale—Absence of supervisor's certificate from assessment roll, from which leaves appear to have been removed—In absence of proof, no presumption arises that the roll or absent leaves ever contained certificate.

1. A return of land by the town treasurer is essential to a valid sale of said land for taxes.
2. Where on the introduction of an assessment roll from which certain leaves appeared to have been removed, the supervisors certificate was found to be wanting, and no proof was made that the roll or the absent leaves ever contained it, no presumption arises of such fact.

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Error to Wayne. (Look, J.) Argued June 22, 1888. Decided October 26, 1888.

Ejectment. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Fraser & Gates, for appellant.

Hamilton Balus (Moore & Moore, of counsel), for defendant.

SHERWOOD, C. J. The plaintiff brings ejectment to recover possession of the S. ½ of the W. ½ of the N. W. fractional ¼ of section 5, in township 3 S., of range 9 E. The plea was the general issue. The cause was tried in the Wayne circuit court, before Judge Look, with a jury. At the close of the testimony the circuit judge directed the verdict against the plaintiff, who brings error.

The plaintiff claimed title from the government, also under a tax deed executed October 20, 1884, for the taxes of 1859 and 1872.

The defendant was in possession when the suit was commenced, and claimed title under two tax deeds, both executed the 28th day of January, 1869, one for the taxes of 1865 and the other for the taxes of 1866. Defendant also claimed continuous, adverse possession from before the date of the tax deeds. He claims that his title has become perfect under his tax deeds by adverse possession, and that the plaintiff's deed for taxes of 1859 and 1872 is void. It is the contention of the defendant that the possession he and his grantors have held of the premises since 1869 has been peaceable and adverse, and that they have occupied in good faith, believing their title to be good, and that these facts appear by undisputed testimony, and the court so held upon the trial.

We think in this ruling the circuit judge was correct;

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but this did not defeat the claim made by the plaintiff. This suit was commenced March 17, 1887, and plaintiff obtained his tax deed on October 20, under sale made on the fifth day of May, 1884, and if this conveyance was good to convey to the plaintiff the title to the property the adverse posession would be of no avail.

The defendant attacks the validity of this deed, on the ground, as he claims, of fatal defects in levying the taxes for which the land was sold, and upon which sale the deed was given by the Auditor General. It appears the property was not returned for the year 1859, and any sale for the taxes of that year would be void. The assessment roll for 1872 was introduced in evidence, but it contained no certificate of the supervisor. It was claimed upon the trial that the roll had been cut and mutilated, and some of the leaves had been taken out, but there was no proof that the roll ever contained such certificate, or that the absent portions contained it. Such being the fact, and what was claimed to be the roll having been introduced in evidence, no presumption arises that the roll ever contained such certificate. This certificate was material, and the absence of it rendered the sale for that year void.

The plaintiff having failed to establish the validity of his tax title, he could only rely upon the original title to sustain his claim, but, as we have seen, the defendant had held possession adversely for more than 15 years as against that. Upon the undisputed facts as they appear upon this record the plaintiff failed to establish his title.

The judgment at the circuit must be affirmed.

The other Justices concurred.

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THE PEOPLE v. JAMES M. CLEMENT.

Criminal law—Commencement of prosecution—Statute of limitations—Complaint—Warrant—Seduction—Fugitive from justice.

1. Making a complaint in a criminal case is not such a commencement of suit as will prevent the running of the statute of limitations.
2. A complaint for an offense not triable by a justice may be oral, although the better practice is to reduce it to writing.
3. In order to commence a criminal prosecution, there must not only be a complaint on oath, but a warrant must be issued by the justice, and placed in the hands of an officer for service.
4. How. Stat. § 9507, deducting from the statutory period of limitation the time during which the party charged was not usually or publicly a resident within this State, does not apply to prosecutions for seduction.
5. Our statutes provide for the prosecution of offenders who are fugitives from justice, and there is no difficulty in commencing a prosecution for seduction within the statutory year when the offender flees from justice.[1]
6. The question whether a warrant has been issued and delivered to an officer, if in dispute, is for the jury.

Error to Oakland. (Moore, J.) Argued June 27, 1888. Decided October 26, 1888.

Respondent was convicted of seduction. Reversed. The facts are stated in the opinion.

Daniel L. Davis and *Peter B. Bromley*, for respondent.

Moses Taggart, Attorney General, and *Arthur R. Tripp*, Prosecuting Attorney, for the people, contended:

1. The complaint made to the magistrate is a commencement of prosecution, and arrests the running of the statute of limita-

[1] See *People v. Kuhn*, 67 Mich. 463 (head-note 2.)

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tions; citing *State v. Howard*, 15 Rich. Law, (S. C.) 282; *Reg. v. Parker*, 9 Cox Crim. Cas. 478; *Rex v. Willace*, 1 East, P. C. 186; and it has been held that the issuing of a warrant by a magistrate on a preliminary examination was sufficient to save the statute; citing Bish. Stat. Cr. § 261 (notes); Whart. Crim. Law, § 449 (notes); 1 Russell, Crimes, 645, 646.

CHAMPLIN, J. The statute provides that no prosecution for seduction shall be commenced after one year from the time of committing the offense.[1]

In this case complaint was made before a justice within the year, but it was not clearly proved that a warrant had been issued and delivered to the officer to be served within the time.

The main question presented by the record is whether making a complaint before a justice is a commencement of prosecution so as to prevent the statute from running.

I think it is not. The complaint is not required to be reduced to writing or signed by the party, or filed with the justice. The justice may reduce it to writing if he sees fit, and ordinarily this is the best practice. I think it would be a dangerous doctrine to hold that an oral complaint, on oath, may be made before a justice, charging a person with crime, and then the justice may delay further proceedings until the statute of limitations expires, and then proceed to issue his warrant for the apprehension of the offender. If this may be done where the limitation is one year, it may be where the limitation is six years. It is plain that such construction of the statute would open the door to grave abuses. The justice might delay until after witnesses to establish the innocence of the accused have died, or removed from the vicinity, or until the facts and circumstances have been forgotten, and the proof made difficult or impossible. I think that, in order to commence a prosecution, there must not only be a

[1] How. Stat. § 9283.

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complaint on oath, but a warrant must be issued by the justice, and placed in the hands of an officer for service. This is the construction placed upon the statute of limitations in civil actions, and I perceive no good reason why it should not apply to criminal prosecutions.

I do not think that section 9507, How. Stat., applies to prosecutions for seduction. That applies by its terms to prosecutions which are to be commenced within six years. The statute says:

"But any period during which the party charged was not usually and publicly a resident within this State, shall not be reckoned as part of the six years."

Our statutes provide for the prosecution of offenders who are fugitives from justice, and there is no difficulty in commencing a prosecution for seduction within the year when the offender flees from justice.

In this case there was some question whether a warrant had been issued and delivered to an officer to be served within a year from the time the offense was charged to have been committed. This question should have been submitted to the jury as requested by the counsel for respondent. The judgment should be reversed, and a new trial granted.

MORSE, CAMPBELL, and LONG, JJ., concurred with CHAMPLIN, J.

SHERWOOD, C. J., (*dissenting*). The crime in this case charged against respondent is seduction, committed with Lucy M. Gregory, in the township of Springfield, at her father's house, in Oakland county, on or about November 29, 1885.

The respondent was tried, and convicted of the offense charged, at the last February term in the Oakland circuit, and was sentenced by Judge Moore to imprisonment at Jackson for the term of two years. The proceedings

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in the case are now before us for review. Fifteen errors are assigned upon the record. Twelve relate to the proceedings had previous to the charge being given, and the remaining three are to the refusals to charge.

The first and last assignments of error are to exceptions taken to remarks made by the prosecuting attorney in opening and closing the case to the jury. In view of the peculiar circumstances surrounding this case, I do not think what was excepted to in these arguments furnish any sufficient ground for reversing this judgment, and I am not prepared to say that they were even subject to exception.

The errors assigned upon the rulings made in taking the testimony cannot any of them be sustained, and it is not essential that they be further herein considered.

The three requests to charge which the court refused, as asked by defendant's counsel, read as follows:

"1. If the jury find that there was no warrant issued and delivered to an officer for service within one year after the alleged offense, the defendant must be acquitted.

"2. The question as to whether a warrant was issued and delivered to an officer is one upon which the jury must be satisfied of beyond a reasonable doubt before the respondent can be convicted.

"3. If the jury find that there was a warrant issued in this case, but not delivered to an officer for service, and was not served upon the respondent, and he arrested, within one year from the alleged offense, the jury must acquit."

These several requests raise the important question in the case. It is whether, under our statute, the prosecution was barred. The statute prescribing the punishment for the offense charged, in the last clause, says:

"No prosecution shall be commenced under this section after one year from the time of committing the offense."

And the judge upon this subject charged the jury, as the law applicable to this case, as follows:

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"Under the latter clause of this section of the statute, the defendant, by his counsel, asks the court to charge that, unless there was not only a complaint made, but a warrant issued and put in the hands of an officer, for the purpose of having it served, the prosecution comes too late. * * * For the purposes of this case, and you will regard it as the law which is to govern you, I charge you that if you find, beyond a reasonable doubt, that there was a complaint made before the justice, Mr. Webster, within a year from the 29th of November, 1885, for the purpose of commencing a criminal prosecution against this defendant for the crime charged in this information, that would be a sufficient commencement of the prosecution, so that the action would lie."

It is the commencement of the prosecution within the year which saves the statute from running, and the only question to be determined in the application of law upon this subject is, what is to be considered the commencement of the prosecution?

A complaint is the first and a necessary prerequisite to a valid prosecution under our practice. It is that which gives the court jurisdiction to issue the warrant, and, if a warrant is subsequently issued upon such complaint, it is difficult to see why the complaint is not the commencement of the prosecution. *People v. Lynch*, 29 Mich. 274; *Turner v. People*, 33 Id. 369. It is the fact that complaint is made which sets the law in motion in a criminal prosecution, and I can conceive of no good reason why it should not be regarded as the commencement of the prosecution when upon it a warrant has been issued, and the proceedings thereon are continued until an information is filed, upon which trial is had and judgment rendered, as in this case. *State v. Howard*, 15 Rich. Law, 282; *Reg. v. Cox*, 9 Cox Crim. Cas. 301; *Rex v. Willace*, 1 East. P. C. 186.

I think the law as given by Judge Moore is both reasonable and right, whatever may be found to the contrary, and should be allowed to prevail in the case.

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The case of *People v. Clark*, 33 Mich. 112, is called to our attention by counsel for respondent. The question there presented does not arise in this case. There it was held that the issuing of a warrant, and placing it in the hands of an officer, was a sufficient commencement of suit. The question of whether or not complaint made and filed in good faith, for the purpose of obtaining a warrant, which was afterwards issued upon it, and the party arrested thereon, and tried and convicted, would be sufficient, did not arise in the case, and was not argued.

It appears that the respondent was not usually or publicly a resident within the State for some time before the year expired, and in such case it is provided by the general statute that during such period the statute does not run. How. Stat. § 9507. I think with great propriety the provisions of this section might be applied to the present case. There is the same reason for the application in criminal cases as in civil proceedings, and the necessity is of much greater consequence.

It is conceded by my brethren, as the case is now presented, the principal question raised is one of practice, not yet settled in this State. In settling rules of practice, as well as in their application, the ends of justice and rights of the parties should always be allowed to control and govern; otherwise legal proceedings become a delusion and a snare; and such, I think, is the effect in this case, if this respondent is permitted to avail himself of the technicality now raised in the opinion handed down by my brethren.

The judgment should, in my opinion, be affirmed.

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72	122
74	402
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83	115
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87	148
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91	268
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107	463
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152	2604
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NETTIE BROCKWAY v. ROBERT PATTERSON.

Liquor traffic—Civil damage law—Injury to widow by death of husband—Evidence—Damages—Qualification of juror.

1. The statute giving a right of action to the wife or other person "injured in person or property or means of support by any intoxicated person, or by reason of the intoxication of any person," is broad enough to include the widow, who must be considered "a person," and who is certainly injured in her "means of support" by the death of her husband *from* intoxication, or *by reason of* the intoxication of himself or another person.
2. Under the statute giving a right of action for injury occasioned by an intoxicated person, it is not for the injured party to produce proof, or for the jury to speculate, upon the probabilities whether the intoxication was the natural cause of the act which caused the death. The *act* itself fixes the liability for the damage upon the person selling or furnishing the liquor which caused the intoxication.
3. In a suit by a widow for damages resulting from the death of her husband from injuries received at the hands of an intoxicated person, evidence of the habits of the husband as a drinking man previous to the date of his injury is pertinent as bearing upon the question of damages; and proof that he was peaceable and quiet when sober, and noisy and quarrelsome when drunk, is also admissible, as bearing upon the question of his intoxication at the time, and whether such intoxication contributed to his injury and death.
4. It is error to exclude, as an element in the computation of damages to be awarded a widow for loss of support by reason of the death of her husband, *his* life expectancy, and ability during *such* period to support his wife.
5. No man who is so prejudiced against another or his business that his prejudice will, of itself, prevent him from doing justice to the testimony of the person against whom such prejudice is entertained, ought to sit as a juror in any case where such person is a party, and in which his liberty or property rights are involved.

Error to Kent. (Montgomery, J.) Argued June 28, 1888. Decided October 26, 1888.

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Case under "civil damage act." Both parties bring error. Judgment in favor of plaintiff affirmed. The facts are stated in the opinion.

Godwin, Adsit & Dunham, for defendant and appellant, contended:

1. By How. Stat., §§ 3391, 3392, 3491, 3313, 3314, the Legislature intended to furnish a definition and limitation that should cover all claims for damages consequent upon death, and the civil damage act was not intended to add thereto; citing *Davis v. Justice,* 31 Ohio St. 359.

2. We do not find that this question has been considered by this Court. The statute under which this suit is brought is construed in *Kehrig v. Peters,* 41 Mich. 475; *Steele v. Thompson,* 42 Id. 594; *Wilson v. Booth,* 57 Id. 249; *Rosecrants v. Shoemaker,* 60 Id. 4; *Flower v. Witkovsky,* 69 Id. 371.

Myron H. Walker, for plaintiff and appellant, contended:

1. The civil damage act is in the nature of remedial legislation, and should be liberally construed; citing *Flower v. Witkovsky,* 69 Mich. 371.

2. It creates a right of action unknown to the common law, and both direct and consequential injuries are included, and effect should be given to all its parts; citing *Volans v. Owen,* 74 N. Y. 526.

3. The weight of authority sustains the right of action in this case; citing *Quain v. Russell,* 8 Hun, 319; *Smith v. Reynolds,* Id. 128; *Jackson v. Brookins,* 5 Id. 530; *Davis v. Standish,* 26 Id. 608; *Mead v. Stratton,* 87 N. Y. 493; *Neu v. McKechnie,* 95 Id. 632; *Roose v. Perkins,* 9 Neb. 304; *McClay v. Worrall,* 18 Id. 44 (24 N. W. Rep. 429); *Kerkow v. Bauer,* 15 Id. 150; *Rafferty v. Buckman,* 46 Iowa, 195; *Ward v. Thompson,* 48 Id. 588; *Richmond v. Shickler,* 57 Id. 486; *Hackett v. Smelsley,* 77 Ill. 110; *Schroder v. Crawford,* 94 Id. 357; *Schmidt v. Mitchell,* 84 Id. 195; *Emory v. Addis,* 71 Id. 273.

4. The jury must trace the injury to the intoxication, and the intoxication to the act of the defendant; citing above cases, and *Steele v. Thompson,* 42 Mich. 594; *Volans v. Owen,* 74 N. Y. 526; *Bertholf v. O'Reilly,* Id. 509; *King v. Haley,* 86 Ill. 106; *English v. Beard,* 51 Ind. 489; *Jackson v. Brookins,* 5 Hun, 530.

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MORSE, J. The plaintiff brought her action in this case under Act No. 191, Laws of 1883, known as the "Civil Damage Act," claiming damages by injury to her means of support as the wife of Adous Brockway, who, it is alleged, by reason of his own intoxication and the intoxication of one Louis Lane, received injuries at the hands of said Lane resulting in death; both of said persons receiving the liquor which caused such intoxication from the defendant, an hotel keeper at Cascade, Kent county, in this State.

The cause was tried in the Kent circuit before a jury, and the plaintiff had verdict and judgment in the sum of $500. Both parties come into this Court upon bills of exceptions, alleging errors at the trial, which were argued and submitted together. The facts, in brief, are as follows:

Adous Brockway, the husband of plaintiff, lived about one and one-quarter miles from the hotel of the defendant, where he had resided since 1884, and was in the habit of drinking occasionally, sometimes bringing liquor home with him. For the last year before his death he was a frequent visitor at the hotel, and had several drunken sprees. Louis Lane worked and boarded a mile or so from defendant.

On the 22d day of May, 1886, Lane and one Dreuse came to defendant's place about 6 P. M., and commenced drinking. It being on Saturday night, other persons, as the hour grew later, dropped in. Brockway was among them, getting in about 8 o'clock. A great deal of drinking was done by the crowd, and both Lane and Brockway, before they left, became intoxicated. Defendant was present, and dealt out the liquor. Lane and Brockway were the last to leave the premises. They went away together about half past 11.

About midnight, John Brass, who lived about three-

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quarters of a mile from the hotel, on the road towards Brockway's home, heard a rap at his door, and a call for help. He found it to be Brockway, and let him in. He appeared to be badly injured, and in great pain, with a lump or swelling near the left temple. He soon became unconscious. The next day he was taken home, and put under medical treatment. He died from the injuries received Saturday night, on the morning of the next Tuesday, May 25th.

On the road it appears that Lane and Brockway had a quarrel. Brockway struck Lane twice, and Lane hit Brockway with a stone just above and back of the left temple. Upon a *post mortem* examination it was the conclusion of the physicians that Brockway's death resulted directly and necessarily from this blow. Both Lane and Brockway were sober when they went to defendant's place.

The first claim upon the part of the defendant is that the statute does not extend far enough, in terms or in spirit, to allow any recovery for the death of a husband; that it does not create any right of action in behalf of a *widow*; that the purport and meaning of the statute confines the recovery to damages resulting from injuries that do not end in death. It is argued that at common law no action could be brought by a widow on account of the death of the husband; that the Legislature, recognizing this fact, has provided by statute when recovery may be had for loss of life; and that within such statutory provisions, directly aimed at injuries resulting in death, is included all the remedy known to the law for civil damages growing out of the death of any person. See How. Stat. §§ 3391, 3392, 3491, 8313, 8314.

The statute upon which plaintiff grounds her action does not mention the widow, or speak of the death of an intoxicated person, or of death resulting from intoxication.

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It gives a right of action, however, to the "wife" or other person—

"Injured in person or property or means of support by any intoxicated person, or by reason of the intoxication of any person." Laws of 1883, Act No. 191.

This language is broad enough to include the widow, who must be considered a "person," and who is certainly injured in her "means of support" by the death of her husband from intoxication, or by reason of the intoxication of himself or any other person. In this view we are supported by decisions in other States under similar statutes. See *Mead v. Stratton*, 87 N. Y. 493; *Roose v. Perkins*, 9 Neb. 304 (2 N. W. Rep. 715); *Rafferty v. Buckman*, 46 Iowa, 195; *Hackett v. Smelsley*, 77 Ill. 110.

It is further contended upon the part of the defendant that the injury must be the direct, necessary, or probable result of the intoxication. It is argued that the liquor drank by Lane and Brockway was beer, a mild stimulant at best, and one not likely ordinarily to cause such intoxication as would naturally lead to a quarrel or conflict between the parties. But the fact that intoxication did result to both these parties from the drinking of beer alone must have been found by the jury, under the charge of the court, or their verdict would have been for the defendant, if they followed, as we must presume they did, the instructions of the circuit judge. There was certainly evidence tending to show such intoxication.

It is claimed that the injury to Brockway, which resulted in his death, being conceded to have occurred in an affray between him and Lane, cannot be said to have been the necessary or probable result of the intoxication of either; that under all the testimony of the case the death of Brockway cannot be considered as the "natural and legitimate" result of either the selling of the beer, or the intoxication that resulted from the drink-

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ing of it. The following cases are cited in support of this claim: *Flynn v. Fogerty,* 106 Ill. 263; *Shugart v. Egan,* 83 Id. 56; *Schmidt v. Mitchell,* 84 Id. 195; *Krach v. Heilman,* 53 Ind. 517; *Collier v. Early,* 54 Id. 559; *Dunlap v. Wagner,* 85 Id. 529.

We have examined these cases. The statutes of these states are different from ours. In Illinois the opinion of the court in 83 Ill. is based upon the assumption that the words "all damages sustained" should be construed with reference to their known legal signification; that is, such damages as, in legal contemplation, are to be regarded as the result of the wrongful act. See 83 Ill. 57.

In Indiana the right of action is given to any—

"Person who shall sustain any injury or damage to his person or property or means of support on account of the use of such intoxicating liquors"—

Sold in violation of law. The decisions in that state are expressly based upon the words "on account of the use." See *Dunlap v. Wagner,* 85 Ind. 531.

The plaintiff's counsel in this respect contends that it is not necessary to trace the injury to the intoxication,—the fact of intoxication is enough; that if Lane was intoxicated when he struck the blow that caused the death of Brockway, the case comes within the express words of the statute, which reaches any injury to her means of support by any intoxicated person. He cites the following cases: *Neu v. McKechnie,* 95 N. Y. 632; *King v. Haley,* 86 Ill. 106; *Schmidt v. Mitchell,* 84 Id. 195.

The first case fully supports the contention of the plaintiff. It is there expressly held that it is not essential to maintain an action of this kind that the plaintiff must show that the act of the intoxicated person, which caused the injury, was the natural, reasonable, or probable consequence of his intoxication; it is sufficient if it

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appears that the act was done while the person was intoxicated, in whole or in part, by liquors sold by the defendant.

In my opinion, this construction of the statute is the only proper one. The statute provides, as plain as the English language can state it, that this action shall lie for any injury occasioned by an intoxicated person. It is not for the injured party to produce proof, or for the jury to speculate, upon the probabilities whether the intoxication was the natural cause of the act which caused the death. The act itself by a person intoxicated fixes the liability for the damage upon the person selling or furnishing the liquor which caused the intoxication.

But the court did not go so far as this. The jury were plainly instructed that they must find the injury to have resulted from the intoxication of Lane. The court said that they must find that the intoxication of Lane was so connected with his act of striking the blow that they could say that,—

"According to reason, observation, and experience, the intoxication of Lane was the efficient cause of the blow; that the result must be fairly traced to Lane's intoxication."

This instruction was sufficiently favorable to the defendant, under all of the authorities.

It cannot be claimed that the selling of the beer was lawful. It was, perhaps, in the first instance, if the defendant did not know that either Lane or Brockway was in the habit of getting intoxicated; but there was evidence tending to show that both of them were furnished liquor after they had become intoxicated. It is therefore not necessary to examine into the liability under the statute where liquor is sold or furnished within the law. See *Flower v. Witkovsky*, 69 Mich. 371 (37 N. W. Rep. 364).

Complaint is made that the court erred in allowing

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inquiry into Brockway's habits as a drinking man previous to the night he was injured, and also in permitting proof to be introduced that he was peaceable and quiet when sober, and noisy and quarrelsome when drunk.

We think the testimony was admissible in both cases. His habit as to drinking before this time of the affray between him and Lane was a pertinent subject of inquiry as bearing upon the question of damages. In cases of this kind it must be conceded that the loss to the wife of a sober and industrious husband must necessarily be greater, in a pecuniary sense, than the loss of one who is the opposite. But it is argued that this evidence had a tendency to impress the jury with the idea that the defendant was responsible for the drunken sprees of Brockway previous to the night in question, when there was no testimony tending at all in that direction. In answer to this argument it may be said, without disputing the proposition that there is no evidence showing that defendant was responsible for Brockway's habits, that the circuit judge very clearly confined the whole controversy in this respect to the one night, and the small amount of the verdict is pretty conclusive proof that the jury did not charge defendant with the responsibility for the previous worthlessness of the husband caused by drink.

The second inquiry was admissible as bearing upon the question whether or not he was intoxicated upon the night in question, and whether such intoxication contributed to his injury and death.

There are other assignments of error, but we do not regard any of them as material. It does not seem to us that the jury were misled upon the subject of damages or prejudiced against the defendant in that respect, by any of the testimony admitted. The charge very clearly confined the damages to compensation for loss of means of

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support to the wife alone, and carefully guarded against the danger of the jury awarding damages in gross of the whole amount the support of her husband might be found to be worth to her. The court said:

"Now the expectancy of her life is 33 and 21-100 years. This would furnish you *data* from which you could determine—that is, the evidence which has been offered tends to show that the expectancy of her life is 33 and 21-100 years—this would furnish you *data* from which you could determine with reasonable accuracy what would be fair to award to this plaintiff. But in such a case I should caution you that the damages ought not to be a sum total equal to the amount in gross of all the support which you find that the plaintiff would have received from her husband during his life. The reason of this is that whatever sum you award her she receives now in gross, and will have the use of this sum, and the income of which will aid in her support; so that you can see that it would be unjust to now award her in gross a sum equal to all that she would during the entire expectancy have reasonably expected to have received, because, she receiving whatever you award her in gross, the income of that award would and should be applied to her support, and in reduction to the amount which you should award her. Although there is no evidence which affords any opportunity for an exact computation upon that in the case, yet the true and fair basis would be what it would cost to purchase an annuity; in other words, what sum in gross would enable the party investing the money, and applying the interest and enough of the principal together, to, during the period that you should find that she would have received that support from her husband, equal the amount which she would have received from year to year for her support. This is a subject which should receive careful attention at your hands, in order, on the one hand, if you find for the plaintiff, that the award should be just, and commensurate to the injury sustained; on the other hand, that it should not be oppressive, or out of proportion to the injury, or based upon any fanciful or illusionary figures."

With the expectancy of this woman's life being at 33 years and upwards, if the expectancy of the husband's life

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was not also taken into consideration, the jury must have found the support by the husband to be of little value, and cannot be said to have been prejudiced against the defendant. The annuity to be purchased by $500 would cut a very small figure indeed in compensation for the support afforded by a husband that was worth living with.

It is true, as contended by the counsel for defendant, that, in the computation of a sum to be awarded in gross in cases of this kind, the length of time that the husband might have been expected to live if he had not received this injury, and his ability during such life to support the wife, should also be taken into consideration. If an old and feeble man, the sum ought to be much less than if he were a young and vigorous one. The circuit judge did not as clearly set forth this consideration as he might, or perhaps as he ought to, have done, in connection with his remarks as to the wife's expectancy of life. The jury were instructed that the plaintiff was entitled to her loss of support for the time which they might find she would have received such support from her husband had he continued alive. This would have been a proper instruction had not the court further said:

"The jury should then take into account the length of time which the plaintiff would be expected to live, and with this *data* the jury can get a fair, reasonable, and just award."

This remark, in connection with the portion of the charge heretofore quoted, would be open to the complaint that the jury were thereby misled into considering and determining that the plaintiff was entitled to the loss of her husband's support during the expectancy of her life, without reference to the probabilities of the husband's life continuing as long as she might live, were it not for the fact that the amount of the verdict is so

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small, under the evidence, that it is self-evident that the probability of the husband's life must have been considered in fixing the amount of damages. We are therefore of the opinion that no prejudice resulted to the defendant from the charge of the court.

The plaintiff, in her bill of exceptions, claims error in the impaneling of the jury. Several of the persons drawn as jurors were asked if they would allow less weight and credit to the testimony of the defendant, because of his being a saloon keeper, than they would if he was engaged in some other business. Those who answered that the mere fact of the defendant being engaged in the sale of liquors would in their minds affect his credibility as a witness, or that they entertained a prejudice against a liquor seller to such an extent that they could not give his testimony the same credit that they would a person not engaged in the business of selling liquor, were challenged for cause, and excused by the court. It is claimed by the counsel for the plaintiff that this was error. It is argued in support of the proposition that "it is a notorious fact, a matter of every-day experience, that saloon-keepers, as a class, are not credible or truthful in cases affecting their business, as are other classes of business men;" that perjury is "frightfully common" among them in all such cases; and that, "while the law presumes that they shall be men of good moral character, they are, in fact, notorious law breakers;" that the business of a witness is a matter of rightful inquiry in all cases, and a fact to be weighed by the jury in determining the value of his testimony.

From this argument it is deduced that a juror cannot be considered disqualified because he exercises his right to judge the occupation of a witness as it is known to be, one—as in the case of a saloon keeper—which affects the truthfulness of his testimony. It is not to be dis-

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puted that many persons share the same opinion of those engaged in the sale of liquor which is shown in this argument, but the trial of this case in the circuit court demonstrated the fact that this opinion is not held by every one, and there seems to have been no difficulty in securing a jury of 12 good citizens, who had no prejudice against a saloon keeper sufficient to prevent them from impartially weighing his testimony, without regard to his occupation, and giving him a fair trial of his case upon the merits.

It is not necessary, in my opinion, to cite authority to show that he was entitled to such a jury and such a trial. No man who is so prejudiced against another or his business that this prejudice will, of itself, prevent him from doing justice to the testimony of the person against whom he holds such prejudice, ought to sit as a juror in any case where such person is a party, and has his liberty or his property rights involved. The liquor seller has the same right to an impartial jury and a fair trial as any other man, and he can have neither if the argument of the counsel for the plaintiff is sound. To permit one who believes a saloon keeper to be the embodiment of all that is vile, and incapable of telling the truth where his interests are concerned, to sit as a juror in a case of this kind, would be an outrage upon justice, and a violation of the law, which presumes that all men are honest and truthful until the contrary is shown

Nor do we think the court erred in excluding the statements of Brockway, made to Brass at his house on the night of the injury, as to his injury and how he received it. Neither is it apparent that the rejection of this evidence resulted in any harm to the plaintiff. The jury must have found, under the charge of the court, that the injury was inflicted by Lane while he was intoxicated, or by reason of the intoxication of one or both of them, or

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their verdict would have been for the defendant. The statements of Brockway made to Brass must have been to the same effect, or its exclusion could not have prejudiced plaintiff, and, as it was, the jury seem to have reached the conclusion desired by the plaintiff without such statement.

The judgment will be affirmed, with costs to plaintiff, with the exception of cost of making and printing plaintiff's bill of exceptions, which must be borne by her.

SHERWOOD, C. J., CHAMPLIN and LONG, JJ., concurred with MORSE, J.

CAMPBELL, J. I do not think the statute covers such indirect results as are shown or claimed to be shown in this case.

HANNIBAL G. COBURN v. THE MUSKEGON BOOMING COMPANY.

Logs and logging—Booming companies—Negligence—Evidence—Damages—Interest.

1. Under the statute providing for the organization of log-running and booming companies, the corporation has the right on the streams where it can lawfully do business to construct, use, and maintain all necessary booms for that purpose, the location, extent, manner of construction, and number of which is left to its own determination, subject to the statutory restriction that, so far as practicable, they must be constructed and used in such a manner as to allow the free passage of boats, vessels, crafts, logs, lumber, timber, or other floatables along the stream.
2. In a case involving the question of whether a booming company properly managed its business of log driving during a given season, a witness who is shown competent to testify on the subject may aid the jury by giving his opinion whether the work was properly done or not.

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3. In a suit against a booming company for obstructing a river, and thereby preventing the plaintiff from putting his logs into the river by July 1 of a given year, as he had contracted to do, the manner in which he did his job, or at what time he did it, whether within the contract or not, is no concern of the defendant, and could have no effect, by way of excuse or otherwise, for any obstruction to the right of passage to plaintiff's logs down the stream.
4. A question giving the contents of a paper which a witness is being interrogated about, and which is not introduced in evidence, is incompetent.
5. The requests to charge of defendant, set forth in the opinion, are held to have been properly refused, for reasons therein stated.
6. Interest cannot be allowed upon a claim for expenses paid, as claimed, by reason of the wrongful act of the defendant, the existence of which claim is only determinable by the verdict.

Error to Montcalm. (Smith, J.) Argued June 29, 1888. Decided October 26, 1888.

Case. Defendant brings error. Reversed. The facts are stated in the opinion.

Edwin F. Uhl, for appellant, contended:

1. The court erred in refusing defendant's first request (see opinion), which is based upon a variance between the allegation and proof, in this, that the declaration charges the defendant with malfeasance, while the proof tends to show negligence merely, if anything; citing *Macumber v. Booming Co.*, 52 Mich. 195.
2. The right of defendant to run logs, and that of plaintiff to put them in, are concurrent, and each is to be exercised without negligence; citing *Booming Co. v. Nelson*, 45 Mich. 583.
3. Interest is not allowable as damages if there is no final understanding as to how much is to be paid; citing *Railway Co. v. People*, 46 Mich. 193; *McCreery v. Green*, 38 Id. 185; *Davis v. Walker*, 18 Id. 25; and the general rule is that interest is not to be allowed on unliquidated damages; citing 1 Suth. Dam. 610; and see *Lucas v. Wattles*, 49 Mich. 383.
4. The opinion of Mr. Moon, as to the manner of handling logs by the defendant in 1882, ought to have been received. He was a man of large experience on the river, and well qualified to speak intelligently on the subject; citing *Enright v. Hartsig*, 46 Mich. 469.

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William E. Hoyt (J. C. Fitz Gerald, F. A. Stace, and *Charles Chandler,* of counsel), for plaintiff, contended:

1. The competency of a witness as an expert is for the court to find; citing *McEwen v. Bigelow*, 40 Mich. 215, 217.
2. There was evidence of loss of time by plaintiff's men sufficiently certain to form a basis for the allowance of damages; citing *Booming Co. v. Nelson*, 45 Mich. 583; *Heiser v. Loomis*, 47 Id. 19; *Gilbert v. Kennedy*, 22 Id. 130; and the court properly declined to take this question from the jury; citing *Doyle v. Mizner*, 40 Mich. 160, 164; *Teipel v. Hilsendegen*, 44 Id. 461, 462; *Demill v. Moffat*, 45 Id. 410.
2. While interest could not be demanded, it was right and just that it should be given, and its allowance was not error; citing *Kendrick v. Towle*, 60 Mich. 368; *Lucas v. Wattles*, 49 Id. 383; *Snow v. Nowlin*, 43 Id. 387; *Cook v. Perry*, Id. 628.

SHERWOOD, C. J. This action was brought in the circuit court for the county of Montcalm to recover damages which plaintiff alleges he has sustained in consequence of the defendant having prevented the free passage of logs down the Big Muskegon river, by putting in and maintaining a boom across the river, and causing a jam, and preventing the plaintiff from putting into the river logs which he had contracted to deliver afloat therein before July 1, 1882.

The record shows that October 10, 1881, the plaintiff entered into an agreement with R. H. Roys & Co., of the city of Greenville, whereby he was to cut, haul, and put afloat in the Big Muskegon river on or before the 1st day of July, 1882, all the pine timber on 400 acres in Mecosta county, for which services Roys & Co. were to pay him $500 in advance, and $1 for each thousand feet cut and skidded each month, and $1.50 additional for each thousand feet banked on the river, and the balance of the contract price when all the logs should be afloat. Roys & Co. also agreed to procure for plaintiff the right of way for tram-roads and other roads from the timber to the Big Muskegon river, a distance of about three miles,

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and also the right of rollways for putting the logs into the river, neither Coburn nor Roys & Co. owning the bank. The plaintiff commenced building the roads in December, and finished them in April.

The defendant is a corporation organized under the statutes of Michigan for the purpose of running, driving, booming, and rafting logs on any streams or waters in this State. The statute gives it power to acquire and hold such real estate and personal property as is necessary for the purpose of carrying on business. It may make contracts with parties for running, booming, and rafting logs.

The statute[1] contains the following clause:

"*And provided, further,* that such boom or booms shall be so constructed, and, so far as practicable, used, as to allow the free passage of boats, vessels, crafts, logs, timber, lumber, or other floatables along such highways."[2]

Under the charter of this company defendant had the power and right on the streams where it could lawfully do business to construct, use, and maintain all necessary booms for its business. Their location, extent, manner of construction, and number is left to its own determination, subject only to the restrictions above mentioned.

The record further shows that during the year 1882 the defendant was engaged in the business of running, driving, and booming saw-logs and other timber on the Big Muskegon river and its branches, and delivering the same to the owners thereof where required at points in and

[1] How. Stat. § 3917, gives such corporations the power and the right in any of the *navigable* waters of this State, named in their articles of association, to construct, use, and maintain all necessary booms for their business, *Provided always*, that they shall first have obtained from the owner or owners of the shores along which or in front of which they desire to construct such boom or booms, either by lien or purchase, their permission so to do, and subject, also, to the proviso set forth in the opinion.

[2] By Act No. 80, Laws of 1883, this provision is amended so as to read "such boom or booms shall, so far as practicable, be so constructed and used," etc.

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around Muskegon lake, at the mouth of the river, and into which it flows, and for that purpose the defendant, as such corporation, assumed control of all the logs put afloat on the river during the year, including those put in by the plaintiff, and undertook to run and drive them down the river in due season.

It further appears that during that year the defendant maintained at different points in the river spiles and piers, at which it could place booms across the stream, and stop the passage of logs. Among others in its course down stream defendant maintained these spiles near Croton, a short distance above the junction of the Little and Big Muskegon rivers, and at which point the river was between 300 and 400 feet wide; also the Orton piers, about 10 miles below the Croton spiles; also the Newaygo piers, about 5 miles below the Orton; and then came the Sand Creek piers, near the lake, and below which were the sorting grounds of the company.

It further appears from the record that the plaintiff, for the purpose of filling his contract in putting the logs afloat, rented a tract of land on the bank of the river, suitable for rollway purposes, and about 12 miles on the river above the Croton spiles, and constructed a tramway from the land containing the timber to the rollway, procured cars, employed men and teams, and commenced to cut, haul, and put afloat the logs from the land under his agreement with Roys & Co.; that his rollway was constructed along the bank of the river where the bank was very high, being about 100 feet down to the edge of the river, and in such manner that but one man was required to keep the rollway clear of logs as they were unloaded; that the defendant used its boom at Sand Creek to regulate the passage of logs down to the sorting grounds, and which was frequently used to keep the logs back until those that had passed the boom could be properly assorted

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by the men below. The plaintiff claims as his grievance—.

"That shortly after the opening of the log-driving season in 1882 (the defendant having control of and running all the logs put into the river from Houghton lake to Muskegon lake, and being engaged in the usual manner in running logs down the entire length of the river) a difficulty occurred at the assorting grounds near Muskegon lake, and the men there in the employ of the defendant quit work, and refused to work longer for the defendant except on certain terms and rates of wages to which defendant was not willing to accede; whereupon the defendant, notwithstanding the fact that the river was then well stocked with logs coming down steadily from the various rollways along its banks, under the control of the defendant, during the month of April, 1882, refused to hire and employ men at its sorting grounds, and stopped work thereat, and refused to allow any logs whatever to pass the boom at Sand Creek, and for the purpose of stopping the logs, and holding them in the river, defendant stretched a boom across the river at the Orton piers, and stretched another across the river at the Croton spiles, all in the month of April, and while logs were being rapidly run down the stream from above by the defendant.

"These booms were so placed for the express purpose of stopping the logs. The effect of placing these booms across the stream was to stop the passage of the logs entirely. The boom at the Orton piers arrested all that had passed the Croton spiles, and all that came from the Little Muskegon and other tributaries below the Croton spiles, as well as those put in the river between it and Croton, forming a stationary jam from the Orton piers up stream to within about two miles of Croton. The boom at the Croton spiles stopped all the logs then passing down the stream, causing a jam, and the defendant continued, after placing this boom, to run and drive logs from above steadily down until stopped by the boom. In consequence a solid stationary jam of logs was formed, extending from bank to bank of the river, and several logs deep, which rapidly set back many miles, extending up stream to, and for several miles beyond, the plaintiff's rollways, filling the river with a compact mass of logs from bank to bank, and several logs in depth, for the entire distance.

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"And during the time from the placing of the boom until the latter part of July the defendant suspended operations as to running and driving logs, except to run logs from above into the jam above the Croton spiles, and discharged its men, save enough to preserve the booms intact, so that logs could not pass. Instructions were given to the defendant's employés at these several booms to maintain them, and not to permit logs to pass them, at all hazards, and by force, if necessary; and the defendant did maintain these booms, and the jams so formed, wrongfully and by force, and without doing anything itself towards the driving and running of logs in the river (except running logs from above into the jam formed by the Croton spiles boom), and preventing any other person from running or driving logs from sometime in April, when the booms were first placed, until the latter end of July, when it to some extent resumed its sorting works, during which time the boom was not opened, save for a day or so, about the beginning of July, to allow the floating boarding shanties of the defendant to pass.

"The defendant, during the last few days of July, and in August, September, and October, had a small force of men at work on this jam above the Croton spiles, and commenced to 'pull' the jam July 25, and from that time the jam was moved from time to time, at intervals, moving when it moved bodily, *en masse*, and continuing in motion for periods varying from half an hour to several hours each; but the jam remained substantially unbroken until late in October of that year.

"At the time that this jam above the Croton spiles was formed and became extended up to the plaintiff's rollways the plaintiff still had the greater part of his logs to put in. The effect of this jam was to prevent the logs from floating off away from the plaintiff's rollways, by the natural flow of the water, and plaintiff was thereby compelled, as the best thing he could do under the circumstances, to bank and deck the logs on his rollway until it was filled, and then to form other rollways along the bank of the river, and extend his tramway thereto, and fill them, to be ready to put his logs afloat when the jam should be broken and moved out.

"All this caused great additional expense by the extension of the tram-road and formation of new rollways, and requiring five or six men and teams to unload the logs, and deck them up on the rollways, instead of the one

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man required when there was no jam, besides great expense in loss of time by men and teams lying idle in consequence of hindrances at the rollways by reason of the jam, and very great expense incurred in breaking rollways; and plaintiff was unable to get all his logs into the river that fall, a very large quantity being unavoidably left over until the following spring, whereas, had this jam not been formed and maintained, he would have been able, at a comparatively small expense, to have completed his job in one season."

And by reason of the said several premises the plaintiff avers he has sustained $10,000 damages.

The defendant claims the testimony shows that the case is one where all the loggers in the vicinity of the river, from its source to its mouth, were striving each to put in his own logs, and place the same under the custody of the defendant, who was the common agent of them all, without any regard to any inconvenience to the other log-owners or to the defendant, the defendant not having any control over any of the owners; that all put in these logs when they wanted to or could, and did so without any regard to any other owner, and without any regard to the capacity of the stream, or the ability of the defendant to drive such an excessive quantity; that all that could be required of the defendant under such circumstances was to do the best it could with such reasonable force as was at its command to drive the logs, and that this the defendant did, having due regard to the property of each.

That, to the extent that this required the delaying of some logs, whosever they might be, it was justified, and no matter whether such logs were afloat or ready to put afloat; that simply showing that the defendant might possibly have freed the river of logs in front of the plaintiff's rollways, for a time, in some manner, was not sufficient evidence of negligence on the part of the defendant to make it liable, as the common interest of all the log-owners was involved, and it may have required that the

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drive should be held back; that it is neither law nor justice to hold the defendant liable for all the hindrances and delays the log-owners have caused one another; and that it would be equally unjust to make defendant pay damages to one who has suffered injury, if such injury resulted from reasonably good management in behalf of all interested, or from his own neglect or tardiness.

The defendant also further claims that the plaintiff did not avail himself of his opportunities to put his logs into the river; that there was open water in the river before the middle of April in 1882, and that then for the first time the plaintiff began unloading his tram cars of logs, which floated off freely with the current, and so continued until after June 1 of that year; that logs of the owners did not come down from above till sometime after June 1, and then for several months the river was full of logs coming from above, until the drive got past; that the plaintiff, having neglected to put in his logs in advance of the drive, was obliged to take his chances in getting his logs into it; that six months of plaintiff's contract time for putting in his logs had then already elapsed, and that he had two months after the 15th of April, when the river was open, for putting in his logs from the rollways, and failed to do it, and had but one month under his contract when the logs put in by others came down and filled the river full, compelling him to then wait until the rear of the drive had passed.

Defendant further claims that during all this time it did all that it could, and all that could be done, to hasten the drive down the river, having proper regard for all parties interested; that the plaintiff did not manage his rollways properly after the drive was abreast of them; that he piled up 4,000,000 feet of logs on his rollways, and continued to roll them on until the piles were 100 or 125 feet deep, and then he employed but three or four men

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to break the rollways into the drive, and that his entire management of his logs was improper, and not calculated to hasten their passage down the river, and that the delay, if any, was largely attributable to these causes, and not to the negligent acts of the defendant.

The foregoing is a full statement of the theories of the respective parties, and the facts upon which the plaintiff bases his cause of action, and the defendant's counsel claims a defense.

Upon these theories the cause was tried by the respective counsel, and by the court submitted to the jury.

The verdict was for the plaintiff for the sum of $3,012.40.

The defendant asks a review of the case in this Court.

The record is very full, and a large number of exceptions were taken upon the trial. Those relating to the testimony will be first considered. Several were abandoned on the hearing. We have examined all the others as they stand in the record. Only those, however, will be herein noticed which were argued by counsel at the hearing.

We do not think the first five exceptions as they appear in the defendant's brief are well taken. They relate to the damage sustained in consequence of the alleged unlawful obstruction maintained in the river by the defendant, and the testimony all had a material bearing upon the amount of damages the plaintiff sustained. We think it was competent to make the proof he offered under his theory of the case.

The defendant called and examined as a witness R. A. Moon, and asked him the following question:

"What can you say as to whether the boom company handled the logs in the river as well as they could have been handled?"

Counsel for plaintiff objected to the question "as incompetent, irrelevant, and leading;" also, that "the

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witness has not shown himself competent to give an opinion."

Before this the witness had testified that in 1882 he logged on Muskegon river.

"Put in that year between 25,000,000 and 30,000,000 feet. Put some of them in every month of the year, working steady the year round. Don't remember the section the logs were on in Newaygo county, about seven miles by land above Croton. * * * I worked from January, 1880. I worked five years right along in succession. * * * From April, 1882, to July, 1882, I put in about 2,000,000 feet a month."

Then the above question was put, and the objection was sustained. The witness further testified:

"*Q.* State as far as you know, so far as your observation went, in what manner the boom company handled the logs of that year.

"*A.* Well, all I saw was driving, men starting the jam on the river, when they hauled them from below along by my rollways, and different places along the river. * * * When I saw the river it was full.

"*Q.* So far as your observation of the river went, and the operation of the boom company on these logs, state whether it was properly done or otherwise."

This was objected to by plaintiff's counsel, upon the ground that the witness has not testified to his familiarity.

"*By the Court.* I guess he need not answer. He has not stated very much knowledge about what was done.

"*Q.* For how many years have you put logs into the Muskegon river?

"*A.* I quit in the fall of 1882. Well, it was about 27 years.

"*Q.* You never had anything to do with driving the river, did you?

"*A.* Not the main river; no, sir. Oh, yes, I drove 20 or 30 miles of it to Big Rapids; * * * that is, not connected with any others besides my own,—just my own logs. I have driven side streams some.

"*Q.* So you have had experience in log-driving?

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"*A.* Yes, on side streams.

"*By Defendant's Counsel.* Now I renew my question."

Counsel for plaintiff again objected that it was not a question of opinion at all. It was what it actually did. It was for the jury to say whether it did or not properly manage it, if the question was to go to the jury at all. It was not a question of opinion for the witness. The court did not admit the testimony.

We think this was error. No objection was taken to the leading character of the question. The witness showed a familiarity with the river, and of the manner to some extent in which logging was done upon it, and had himself run logs upon a portion of it. He also knew from his own observation the condition of the river, and the logs in it, and what was done. We think these facts qualified him to speak upon the subject queried after. The testimony was material. Its effect was for the jury. The court erred in ruling it out. It is true, it involved an opinion upon one of the main facts in the case which was to be found by the jury, but their judgment in nearly all cases may be aided in this way when the witness is shown to be sufficiently qualified to give an intelligent opinion upon the subject

With a view of showing that plaintiff did not get his logs on the Coburn job to the rollways in time to put them in the river in the spring, counsel for defendant asked witness Mitchel:

"What can you say as to the manner in which that job was conducted?"

This was objected to as not competent, and irrelevant, and the objection was sustained. The ruling was correct. The manner the plaintiff did his job, or at what time he did it, whether within the contract or not, was of no concern to the defendant, and could not have any effect, by way of excuse or otherwise, for any obstruction to the

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right of passage of plaintiff's logs down the stream. The plaintiff was entitled to the use of the stream upon which to float his logs down to the lake, according to the natural current of the stream, where the water was not lawfully used by others for floatage.

The record shows that the boom company was paying its men $1.85 per day, and that the men wanted $2 per day for 10 hours' work, and refused to work unless it was paid to them by the company, and the company refused to give them employment at that price, and the men went on a strike. Counsel for plaintiff, on cross-examination, proposed to show the unreasonableness of the wages offered by the company, and after showing that, after waiting about three weeks, the company finally paid the men what they asked (the president of the company was being examined), witness was then asked:

"Didn't you get a written agreement from the owners of the logs to save your company harmless from failure to deliver the logs?"

This was objected to as incompetent and immaterial. The testimony was rejected. The witness was then asked:

"Is it not a fact, Mr. Smith, that you refused to employ these men, by reason of the mill-owners and others having logs in the stream there, that you were running for, agreeing not to make any claim for damages against you or your company?

"*A.* If there was any such thing, they volunteered it. * * * * * * * * * * *

"*Q.* There was such a transaction, wasn't there?

"*A.* I never saw any myself.

"*Q.* Didn't you ever hear of it from the company?"

This was objected to same as at first, and witness was allowed to answer:

"I think there was some such an instrument at the time. Never saw it or read it."

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This testimony was not admissible. It was subject to the objection made of incompetency. The contents of the paper were given in the question describing it. No such paper was introduced. It does appear the witness knew nothing of such a paper, and it does not appear who told him it was in existence. This testimony was seriously mischievous in its character, and ought not to have been received. There may even be some question about the admissibility of the paper itself, if the contents should turn out as intimated in the question.

We find nothing further in the rulings of the court in taking the testimony needing our consideration here.

The following requests to instruct the jury made by counsel for the defendant were refused by the court as requested, and exception was taken to each of said refusals:

"1. That the plaintiff in each count in his declaration has alleged that the defendant wrongfully, unlawfully, willfully, and injuriously caused the logs it was driving to form jams, and placed booms across the river at different places below the rollway, and refused to remove them, with intent to injure the plaintiff, and prevent the plaintiff putting afloat certain logs for Roys & Co. within the time specified in his contract with them. I instruct you that such allegation in the plaintiff's allegations charges defendant with malfeasance, that is, with willfully and intentionally injuring the plaintiff, and that such allegation does not charge the defendant with nonfeasance, that is, with doing a lawful act in so negligent a manner that the plaintiff suffered injury therefrom. And I further charge you that there is no evidence in the case tending to show that the acts complained of were done willfully, with intent to injure the plaintiff. You must render a verdict for the defendant."

"5. I instruct you that the evidence of loss of time by plaintiff's men is too uncertain to form a basis for the allowance of damages."

"7. I charge you that plaintiff cannot recover for any expense in extending his tram-road at the rollway."

"9. I instruct you upon the whole record to find a verdict for the defendant."

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In regard to the first request we think counsel for defendant errs in stating the substance of the plaintiff's declaration as charging defendant with malfeasance only. The declaration does set forth all the facts, and alleges a duty arising therefrom resting upon the defendant, and not only negligent departure therefrom, but willful action in the premises, whereby the plaintiff has sustained injury and damage. We do not think the variance exists between the pleadings and proofs on the part of the plaintiff claimed by counsel for defendant. Neither does the case come within the rule laid down by the majority of the Court in *Macumber v. Booming Co.*, 52 Mich. 195 (17 N. W. Rep. 806).

While the declaration does not use the word "negligence," it states that the defendant was guilty of acts and omissions which necessarily imply negligence. The first count avers that the defendant—

"Disregarding its duty in the premises, wrongfully, unlawfully, willfully, and injuriously permitted and caused the logs and timber it was driving and running down said river to form jams in," etc.

This language implies non-feasance as well as misfeasance, the declaration having previously stated the duty of the defendant in the premises. There was some testimony tending to show non-feasance,—enough, at least, to be submitted to the jury. All objections taken to the declaration on the ground of variance and misstatement of cause of action were properly overruled by the court.

The defendant's fifth request to charge cannot be sustained. It asks that the loss of time of the plaintiff's men caused by the alleged wrongful acts of the defendant be not allowed as an element in computing the damages. Certainly, under the declaration and theory of the plaintiff it constituted a part of his damages. The plaintiff had a right to include all of his damages, if

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rightly declared for, and we think this was, and the court was not in error in rejecting the request.

The seventh request to charge relates to the building of an extra tram-road by plaintiff, claimed to have been made necessary by the wrongful acts of defendant charged. This item of damage was not allowed to go to the jury by the express direction of the court, and there is no occasion to consider it further.

The case was a proper one for the jury upon its facts, and the circuit judge did not err in not holding otherwise, as requested in defendant's ninth request.

The court charged the jury, upon its own motion, that,—

"Upon the question of interest, I say to you that if you find, under the instructions that I have given you, for the plaintiff, I think it would be proper to give him interest from the time that the last expense was incurred. That was sometime in the year 1883."

We think this charge was erroneous, and the error cannot be corrected in the judgment, for the court has no means of ascertaining the amount therein contained. The damages were not only unliquidated, but the existence of any such claim could not be determined prior to the rendition of the verdict. 1 Suth. Dam. 610; *Lucas v. Wattles*, 49 Mich. 383 (13 N. W. Rep. 782); *L. S. & M. S. Ry. Co. v. People*, 46 Id. 193 (9 N. W. Rep. 249); *McCreery v. Green*, 38 Id. 185; *Davis v. Walker*, 18 Id. 25.

There are no other assignments of error which it is needful to discuss; but for those noted we think judgment should be reversed, and a new trial granted.

CHAMPLIN and LONG, JJ., concurred with SHERWOOD, C. J.

CAMPBELL, J., (*dissenting*). As the opinion of the Chief Justice disposes of all but three questions in favor

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of affirmance, and as we think there is no error on those three questions, and that the judgment should be affirmed, it is only necessary to refer to the points on which we do not agree with the Chief Justice.

The witness Moon, who, so far as knowledge of methods of driving are concerned, was probably competent enough, was not allowed to answer these questions:

"What can you say as to whether the boom company handled the logs in the river as well as they could have been handled?"

"So far as your observation of the river went, and the operation of the boom company on these logs, state whether it was properly done or otherwise."

"State the manner in which the boom company handled the logs in the river; to your knowledge, that year."

The answer to this last question was stricken out, and was as follows:

"Well, I think they were handled well, as far as I know anything about it."

This action was not based on any lack of skill in running the log-drive that year, but for the conduct of the defendant in shutting up the river at various times, and in keeping back plaintiff's logs above from coming down the stream in due time. The witness testified to no knowledge of the matters actually complained of, and they were not in any sense questions of skill and good management. Had they been such questions it could have made no difference, for the witness did not testify from any such knowledge of defendant's conduct through the whole season as would have informed him on the material question, which was whether plaintiff had been improperly obstructed and hindered in getting his logs down.

A part of this blockade was laid by defendant to difficulties in getting workmen; and whatever this may have had to do with the result, it was not one of the elements which Moon could have included, or have had any right

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to include, in any estimate which could go to the jury. But he was not asked, and does not appear to have known, anything about it.

We do not think it was error to allow defendant's president to be cross-examined fully concerning the excuse of the strike, and the reason why men were not employed. It was not irrelevant to show, on cross-examination, that witness was induced to hold out against the men by getting an agreement of indemnity from the log-owners affected by the delay. We can see no reason why he could not be cross-examined as to the existence of a written agreement to that effect. The case was not one where such testimony would be excluded, because not the best evidence, and had not reached a point where, if such an objection would apply, it had any application. The existence of papers is very generally allowed to be shown by parol. Where their contents are to be shown, and their tenor becomes important, it is generally, but not always, true that the paper must be shown. This witness, who was certainly one who was likely to have heard, admitted he had heard of such a paper. It belonged to defendant, if to any one, and its existence and possession could only be shown by inquiry. It was not likely the matter was of any importance on the trial, but it was not error to allow the witness to be sifted as to his motives.

We think that where expenses paid form part of the damages there should be interest allowed after the payment, as was done in this case. Unless the money expended is compensated by interest, the party can never be made good for his losses.

We think the judgment should be affirmed.

MORSE, J., concurred with CAMPBELL, J.

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JOHN E. TRAVIS v. HENRY V. SKINNER, COMMISSIONER OF HIGHWAYS.

Townships—Bridges—Repairs—Jurisdiction of commissioner of highways—Cost of improvement—Mandamus.

Under How. Stat. § 1381, the opinion of the commissioner of highways as to the cost of repairing a bridge must prevail, and *mandamus* will not be granted to compel such repairs, on his own motion, where in his return he shows that in his opinion the cost of the same will exceed $1,000.

Mandamus. Submitted October 2, 1888. Denied October 26, 1888.

Relator applies for *mandamus* to compel respondent to repair a bridge. The facts are stated in the opinion.

Frank E. Knappen, for relator.

Dallas Boudeman and *Howard & Roos,* for respondent.

LONG, J. This is an application for *mandamus* to compel the commissioner of highways of Cooper township to repair a certain bridge in said township over the Kalamazoo river.

It is claimed by the petitioner, who is the overseer of highways of road-district No. 13 of said township, that a public highway exists and has been in public use for 25 years and more, commencing on the north section line of section 3 of said township, in the village of Silver Creek, at Argenta station; thence running across the north-west corner of said section; then in a south and south-westerly direction to the section line east of section 4; thence on section 4 in a south-westerly direction to about the eighth line running north and south in the E. ½ of section 4; thence south on said line to the Kalamazoo river; thence

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across the Kalamazoo river, into said road-district No. 13, continuing south to the quarter line running east and west across section 4; thence west, till it intersects with the highway running north and south to section line between sections 4 and 5; said highway extending north from Silver Creek and Argenta station, on the railroad, to intersect with highways in the township of Gun Plain, in Allegan county, the same being the only highway passing through the village of Silver Creek.

That on the N. E. ¼ of said section 4 there is a public bridge on said highway across the Kalamazoo river; the north end of it being in road-district No. 1, and the south end of it being in road-district No. 13, of said township of Cooper, which has been in public use for over 30 years; which said public bridge was erected and maintained at the expense of said township, and has always been known as the "Russell Bridge."

That in the spring of 1887 said bridge was damaged by high water and ice, and was rendered unsafe for public travel, and by reason thereof it was necessary to lay out repairs thereon in order to make it safe and convenient for public travel; and upon investigation it was found that the expense of putting the same in repair would be in excess of $20, or the amount the overseer had the right to lay out for repairs; and thereupon the commissioner of highways, Henry V. Skinner, was duly notified of the condition of said bridge in the month of April, 1887, by the overseer of road-district No. 1, in writing, in accordance with the sections of the statute in relation thereto; and that since the service of said notice it has been notoriously known in said township, and by said commissioner, that said Russell bridge has been and remains out of repair, and not fit, safe, or passable to travel over on foot or with team.

That said commissioner refuses to repair said bridge,

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and that the same can be put in good condition and fit for travel for the sum of $600.

That the highway across said river and said Russell bridge is a public necessity, and it is the main traveled road from Silver Creek and Argenta station south, and the only one out of Silver Creek south.

That it has a post-office, depot, elevator, and market for the people of the surrounding country and other business relations, and that all on the south side of Russell bridge (which is only about one-half mile from the depot and Silver Creek village) have to go around by Plainwell or Cooper Center to get there, which would be six miles one way and seven the other.

That there is a public saw-mill on section 4, between said Silver Creek and said bridge, the patronage of which mostly lies in road-district No. 13; that the same has been cut off since said bridge has become impassable, and that those patronizing the same are greatly damaged thereby.

That in the spring of 1887, and also in the spring of 1888, the north part of said township of Cooper, and those favorably disposed, tried to have an allowance voted at the annual township meeting of each year to fix said bridge; and it was each time voted down by reason of the southern part of the town being the most thickly populated, and holding the balance of power.

Upon filing such petition in this Court an order to show cause was duly made, and the commissioner, in answer thereto, says:

He denies that there has been a public highway and public bridge across the Kalamazoo river as alleged. He admits that there is a public highway in said township running south-westerly from the north line of said township across the N. E. ¼ of section 4, to the east bank of the Kalamazoo river, and a public highway running westerly across a portion of said township, and northerly

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through a part of the N. E. ¼ of section 4, to the west bank of the Kalamazoo river; and that the Kalamazoo river runs the entire length of Cooper township; that through the center of said township, running east and west, is a public highway and public bridge, crossing the Kalamazoo river, and said last-mentioned highway and bridge have been maintained by said township of Cooper for more than 30 years last past, and the same is now in actual use, being maintained by said township.

The public bridges are maintained across said Kalamazoo river at the city of Kalamazoo, Cooper Center, and Plainwell. It is further claimed by the respondent that prior to the year 1868 there was a bridge crossing the Kalamazoo river at the point now crossed by the Russell bridge, and in that year it broke down, and was destroyed, and from that date until about 11 years ago there was no bridge at that point; that about 11 years ago this bridge was rebuilt at that point by private individuals, who were interested in having the same rebuilt, but that the township of Cooper took no part in building the same; that after being so rebuilt the township authorities posted notices, stating that said bridge was not a public bridge, and that the township would not assume any risks in maintaining it, or any liability connected therewith; and that the same has been kept and maintained since that time by private parties, and not at the expense of the township.

That the question of repairing or rebuilding said bridge has been twice submitted to the voters of said township, and voted down, as alleged in said petition; that he has caused estimates to be made, and has estimated the cost thereof himself, of rebuilding or repairing said bridge, and finds that the expense thereof would be not less than $1,500; that there is no appropriation made for the expense thereof, and that the township has refused, and

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still refuses, to vote any money for that purpose, or for paying any order which respondent might draw to pay the expense thereof.

Respondent denies that there is no highway running south from Silver Creek village, except that on section 4, but says that there is a highway running south from said village to the city of Kalamazoo, on the east side of Kalamazoo river; that he has no right or legal authority against the consent of said township to make a public highway out of said bridge, and thus throw the expense of building, repairing, and maintaining such bridge upon the township; and that there is no public necessity for said bridge.

A large number of affidavits are annexed to the petition filed, made by residents of the township of Cooper, and of the adjoining township of Gun Plain, in Allegan county, alleging the necessity of said bridge, and also are found in the record a large number of affidavits annexed to the answer of respondent in opposition thereto. The question of the repair of this bridge seems to have aroused considerable public discussion and dissensions in the community; many of the citizens favoring the repair at public expense, and others being opposed thereto, claiming that it is not now, and never was, a public bridge and highway, and opposing it as such.

The respondent also says that he denies that said bridge has ever been maintained at public expense; that, while it is true that the highways on either side of the river have been worked to the river bank, the bridge is a private bridge, and the highway has never been extended across the river.

It is conceded by the parties that the expense of repair would exceed the sum of $20, the extent to which the overseer of highways may go under the statute, in expending the public moneys for the repair of bridges

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but it appears from the petition, and affidavits thereto annexed, and the answer of the respondent, and affidavits annexed, that there is great diversity of opinion as to whether it could be repaired so as to make it reasonably safe for public travel at a sum not exceeding $1,000, being the limit of the power of the commissioner of highways under the statute to expend the moneys of his township in making such repairs, or in rebuilding the same.

It is provided by section 1379, How. Stat.:.

"The commissioner shall have the care of building, rebuilding, and repair of all bridges, where the cost in either case shall exceed twenty dollars, and in such case he shall proceed to such building, rebuilding, or repair; and, where the cost in any case shall be over fifty dollars, the same shall be let by contract," etc.

This section also provides that where the cost of building, rebuilding, or repair shall be less than $20, the overseer of the road-district shall have charge of and shall proceed to rebuild, etc.

Section 1381 provides:

"Whenever, in the opinion of the commissioner, an exigency may exist requiring the expenditure of a greater sum than one thousand dollars for the building, rebuilding, or repair of any bridge or bridges in his township, he shall notify the township clerk thereof in writing, and the township clerk shall, as soon as may be, call a meeting of the township board to consider the matter of such notice. In case the exigency be deemed sufficient, the township board may order that the question of raising money for such building, rebuilding, or repair be submitted to the electors of the township."

This section then provides, further, that the qualified voters may vote a sum not exceeding one-half of 1 per cent. in any one year on the assessed valuation of the real and personal estate of the township, etc.

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It is insisted by counsel for relator that when this notice was given by the overseer of highways it became the duty of the commissioner under this statute to proceed to repair the bridge; that the only way for him to ascertain what the expense would be, and whether it would exceed $1,000, the limit fixed by the statute which the commissioner could expend, was by advertising for proposals to build or repair, and in this way ascertain the cost. The statute above cited, however, does not require such action on the part of the commissioner. It provides that—

"Whenever, in the opinion of the commissioner, an exigency may exist requiring the expenditure of a greater sum than one thousand dollars," etc.,—

He shall notify the township clerk. The statute plainly contemplates that the opinion of the commissioner shall govern his action.

In his answer the commissioner states that in his opinion the cost would exceed $1,000, exclusive of the approaches. He has also caused estimates to be made of such cost by experts, and is advised by them that the cost of rebuilding or repairing this bridge would exceed $1,000, the limit of the commissioner's jurisdiction, and in the opinion of these parties it would exceed $1,500. Other affidavits are annexed to the answer showing the same facts.

Many affidavits are annexed to the petition showing that this bridge would cost much less than the $1,000, but we cannot from this showing set up our opinion, gathered from these facts stated in the affidavits for the respective parties, in opposition to the opinion of the commissioner, which is to prevail, and upon which he has the undoubted right to act under this statute.

If the cost of the repairs or rebuilding of this bridge exceeds $1,000, and from the opinion of the commissioner

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it appears that it would cost $1,500 to make it reasonably safe for public travel, then the only duty devolving upon the commissioner was to report the facts to the township clerk, whose duty it is to lay it before the township board, and they may submit the question for raising such moneys to a vote of the electors of the township. It appears, however, that the question has been twice submitted to them already, and by a large majority of the electors the vote has been adverse to raising any moneys for this purpose. Under this statute the qualified electors are to determine this question.

We are not satisfied that this bridge is a public highway, or that it was ever recognized by the public as such. It is alleged in the petition to be a public highway, and denied by the answer. If a public highway, as we have seen, the commissioner must make the determination whether the costs of rebuilding or repairing would exceed $1,000, and the statute vests in him the power to make such determination. If it is not a public highway, then whatever the cost, whether $1,000 or half that sum would be required, the commissioner could not be compelled to proceed. The Court could not compel an officer of a township to make it a public highway, or to expend moneys of his township upon its repairs, if not a public highway. The public necessity of a bridge, then, must be determined by the local authorities, and not by the courts.

It is conceded that the highways leading to the river upon either side are public ways; but this fact does not make the bridge a public bridge and public highway, or cast any duty upon the township to rebuild or repair, or make the township in any way responsible for its being out of repair. The statute points out the way to make it public. It is left to the localities themselves to determine whether it shall be so in fact. We have no power,

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under the circumstances shown by this record, to compel the commissioner to act

The writ of *mandamus* must be denied.

The other Justices concurred.

JOHN WILLIS v. THE TOLEDO, ANN ARBOR & NORTH MICHIGAN RAILWAY COMPANY.

Principal and agent—Railroad companies—Employment of porter by station agent

1. In this case plaintiff is held not to have made a case on his own testimony; that the defendant's station agent had no authority to employ plaintiff, and that its superintendent never assented to such employment.
2. It is not for a jury to determine whether the work done by a plaintiff under the orders of a station agent, who had no authority to contract for a railroad company, was beneficial to the company, which, acting through its proper officers, had the right to determine whether or not it wanted the services of a porter at the station.

Error to Shiawassee. (Newton, J.) Submitted on briefs October 5, 1888. Decided October 26, 1888.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

Lyon & Hackleman, for appellant, contended:

1. There was no evidence of any employment of plaintiff by Davis, or of his authority to employ plaintiff, or of any particular necessity requiring the services of anybody, or that any work beneficial to the defendant was done by plaintiff; citing *Railway Co. v. Nichol,* 18 Mich. 170; *Butler v. Railroad Co.,* 60 Id. 83.
2. A corporation cannot be held to have contracted unless by such

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agents or officers as have express or implied authority; citing *Lockwood v. Boom Co.*, 42 Mich. 539.

8. The fact that a party assumes to act as agent is no evidence of his power to act, but his authority must be proved as a fact; citing *Reynolds v. Ins. Co.*, 36 Mich. 131; *Meister v. People*, 31 Id. 107.

James M. Goodell, for plaintiff, cited no authorities.

MORSE, J. Plaintiff sued in justice's court, and declared orally against the defendant for $300 for work and labor performed. Defendant pleaded the general issue. Plaintiff recovered judgment for $50 and costs. Defendant appealed to the circuit court for the county of Shiawassee. Upon trial in that court before a jury, the plaintiff obtained a verdict and judgment for $120 and costs.

It is claimed by the defendant that the plaintiff made out no case, and that the jury should have been directed to find a verdict in favor of the defendant.

The case, as made by the plaintiff, is substantially as follows:

He is 61 years of age, and lives in Corunna, where he has resided for 10 years. He worked in 1886 upon the grade for the defendant, and was acquainted with a Mr. Davis, civil engineer of the defendant. Plaintiff told Davis, before there was any depot or freight-house built, that he would like to get a situation with the company, and Davis said he thought he could do something for him. There was some freight on the steps of the freight-house after this first talk, and on the 25th day of October, 1886, Davis told plaintiff to see to delivering it, and look after things there, and remain until the company discharged him. No authority in Davis to employ him was shown, and this evidence was admitted, against objection, under the proposition made by plaintiff's counsel that it would be followed up by testimony showing an assent to this

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hiring by Mr. Ashley, the general superintendent of the defendant.

Plaintiff delivered freight and collected pay for it until the 18th of November, 1886, when the present station agent, Mr. Northcutt, came, and received from him what he had collected; but plaintiff testifies, on cross-examination, that no freight came during this time, except one or two car-loads of lumber, which the owner unloaded himself.

When the agent came, plaintiff stated to him that he had been there attending to freight and watching the thing, and expected a situation. The agent gave him the keys. He asked the agent for the situation of porter. The agent did not agree to employ him, but said that if the company allowed him anybody he wanted plaintiff to remain. Said he would write to the company, and have plaintiff placed on the pay-roll. No price was agreed upon for his work, but plaintiff testifies that in effect the agent told him to go to work, and he would employ him as porter. Plaintiff built the fires and kept the station and freight-house in order, and handled the freight.

About 15 or 20 days after the agent came the pay car came through. Plaintiff asked the pay-master for his pay. The pay-master looked over his roll, and informed him that his name was not upon it. Ashley was there with the pay-master, as was also Davis. Plaintiff asked Ashley why his name was not on the pay-roll. Plaintiff cannot swear what Ashley said, but testifies that the effect of his answer was that it was a matter that would be looked after hereafter.

"Answered me rather short, and passed along. Just as the car was starting, I had this conversation. I had but a moment with him."

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He claims, however, that at the time he told Ashley that Davis had told him to remain there until the company told him to go, and Davis thought he would get a job prior to the agent's coming there, and that since the coming of the agent he had relied on the action of the agent.

"Q. What reply did Mr. Ashley make to that?
"A. I can't say that he said anything particularly, only that he made some short reply, and turned about and left me."

Plaintiff testifies that he met Ashley afterwards, and said to him:

"Business seems to be picking up a little."

Ashley replied:

"I hope it will; there is not enough of it."

He had another conversation with Ashley upon the platform of the depot.

"I told him it seemed as though I ought to be remembered by the company. I had been there some time, and it was pretty hard work to get a living. My recollection is he didn't make make me any positive reply one way or the other."

Plaintiff did not go to the pay car but once. He testifies that he attempted to go, but the agent told him to wait until he ascertained about the matter. The agent told him he had written to the company about employing him, but he does not remember whether or not the agent told him he could be employed. "Don't remember what he did tell me about the reply." The agent did not say at any time that he was authorized to employ plaintiff. The plaintiff does not remember that he ever asked the agent if he had received any answer to his letter to Ashley as to whether he could have a job or not.

On the 2d of May, 1887, the agent discharged him, took the keys away from him, and said that if he had

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known or thought that plaintiff would make any demand upon the company for pay he would not have allowed him to stay.

The station agent testified as follows:

"*Q.* What did he say to you at that time in relation to the business there?

"*A.* He said: 'You are the agent here?' I said: 'Yes, sir.' He said to me: 'You will likely want an assistant in the shape of a porter by and by,'—something to that effect. I says: 'I expect so.' He said he would like to get such a position with the company. I said I had no authority to engage any person, but that I should like to have an assistant just as soon as the company would give it to me.

"I asked him, I think, if he had any knowledge of railroad work. He said no further than he had been around the depot during the construction of the road, or something to that effect. He said he would like to stay around anyway, in the mean time, and learn the ways of the work such as was to be done, and would be the duty of persons in that position. I said I would have no objection. He said he would like to get a position, and would stay around, and find out the ways of the work, and by and by, when they would engage a man in that position, that I should recommend him, if he suited me, which he would try to do. That was about the understanding at that time.

"He stayed around, and helped put on fires mornings, and handled baggage, such as would be his duties if he were employed, and in no other way could he learn it. There was very little work to do in that line; no more than I could do; and no other hand was necessary. I was not authorized by the company at any time to employ him to assist me. I asked the company for an assistant. He kept on asking me to see about it, and see if I could not get him in. I can't remember exactly what passed, but at different times while there he kept saying he ought to have something; he ought to be employed; what he was doing there was worth something. I kept telling him the company said the business would not warrant the employment of an assistant there, and just as soon as it would I would try and get him a situation.

"He went to the pay car apparently every time it came

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along, but I expected he was seeking some pay he had coming to him. He said he had been in the employ of the company before that; I understood in construction work. I was not aware he was seeking or looking for anything for his current work, or anything of that kind. I didn't tell him not to go to the pay car, I would see he got his pay, or anything of the kind. Mr. Goodell, his counsel, wrote the general manager on the subject of his pay. The manager wrote me asking what it meant, with the letter attached. I returned it, and told him. I guess he wrote Goodell, and this suit was commenced. Willis turned over no money at any time to me."

That he wrote two letters to Ashley, one on the 19th of February, 1887, and one on the 31st of March, 1887, asking that he might place an assistant upon the pay-rolls; to both of which Ashley replied, in substance, that the earnings of the station would not warrant an assistant, but when they did he should have one. He claims that the plaintiff saw both letters and the answers.

Davis swears that he never employed plaintiff, and had no authority to do so; that he told him he had nothing to do with employing help at the stations. He asked Davis to speak a good word for him, and this was his reply to him. Ashley was not sworn.

We do not think the plaintiff made out a case upon his own evidence. Davis had no authority to employ him, and Ashley never assented to such employment. It is not shown that Ashley knew he was working about the station in any capacity.

The circuit judge charged the jury that the plaintiff must prove that he did the work upon an express agreement with the agent of the railroad company, and that such agent had authority to employ him, or other help necessary to do the work of the company, in order to recover; and, further:

"A corporation—and the rule applies to all corporations—can only act in its daily business through its agents.

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Whatever is necessary to be done, whatever help is necessary to do its business successfully, and promote and advance the interests of the corporation, the agent in charge would have the right to procure. But the agent would have no authority to employ a helper to do what he, the agent himself, had been employed to do. He could not employ help to relieve himself from the labor of his employment, wholly or in part, if he were capable of performing it himself. It is only when the business of the railroad company or other corporation cannot be successfully performed by its selected agent, and when there is actual necessity growing out of the increase of business which the agent cannot perform himself, that the company would be liable for the work of another, from necessity, employed by the agent, in the necessary business of the company, but not for the convenience of the agent, in order to relieve him of doing what he was employed to do himself.

"If you find that there was no necessity existing for the employment of additional help to do the work of the railroad company at this office, then the agent had no authority to employ such help, and your verdict would be for the defendant; or if you find that the plaintiff voluntarily worked there with the understanding with the agent that he would work and assist the agent in doing the agent's work, and that the agent should recommend him to a position by appointment from the company, then the plaintiff could not recover. That would be the contract of the agent, and not the contract of the railroad company. If the agent was capable of doing the work himself, there would be no necessity for employing somebody to help him do that which he had been employed to do himself, and the agent would have no right on behalf of the corporation, and it would not bind it. If you find that Davis employed him to do any particular work which was necessary to be done, and which was of benefit to the company, he would be entitled to recover what such services were reasonably worth."

It will be seen that the question was not put to the jury upon the assent of the superintendent to the employment of the plaintiff, or the fact of his work being done within the knowledge of that officer of the corporation. But the liability of the defendant was placed upon the

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broad ground that if the work performed was necessary to be done, and of benefit to the defendant, then either the agent at the station or Davis had the right to employ plaintiff, and the worth of his services under the employment was chargeable against the railroad company.

In this the court was clearly wrong. Neither Davis nor the station agent had any authority to employ plaintiff. It is not for a jury to determine whether the work done by plaintiff, under the orders of persons who had no authority to contract for the railroad company, was necessary or beneficial to such company. The defendant, acting through its proper officers, had the right to determine whether or not it wanted the services of a porter or assistant at this station. The authority of Davis and the station agent was expressly negatived by the undisputed evidence in the case.

The judgment of the court below is reversed, and a new trial granted, with costs.

The other Justices concurred.

CHARLES E. EASTMAN v. JAMES W. CLEAVER.

Logs and logging—Contract—Scale—Evidence—Bills and notes—Principal and surety.

1. Where a contract for cutting and manufacturing logs into lumber provides that the product only is to be measured "when shipped," there is no occasion for a "woods scale," and testimony showing the amount of *logs cut* is immaterial.
2. It was competent for plaintiff to show why the notes for the alleged balance due him from defendant were, for purposes of discount, made nominally by plaintiff to defendant's order. As between each other it is competent to show who was principal and who was surety.

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3. It was competent for plaintiff to testify whether the alleged settlement with defendant was final, that point being one on which defendant raised a dispute; and had himself testified.

Error to Tuscola. (Beach, J.) Argued October 12, 1888. Decided October 26, 1888.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Black, Gray & Corcoran, for appellant, contended:

1. When a contract expressly provides for a particular kind of measurement, that only can be used or given in evidence: citing *Busch v. Kilborne,* 40 Mich. 299; *Perkins v. Hoyt,* 35 Id. 506; *Davis v. Bush,* 28 Id. 438.

T. W. Atwood and *T. C. Quinn,* for defendant, contended:

1. It was competent for the parties to agree that Cleaver should have notice of the shipment, that he might be present at the contemplated measurement, and no other consideration than the mutual understanding was necessary; citing *Gillett v. Bowman,* 43 Mich. 479; *Mason v. Phelps,* 48 Id. 130.
2. It was proper to allow Kaskinette to state *facts* about the manner of Hile's measurement, and his answer was not in the nature of expert evidence; citing *Busch v. Kilborne,* 40 Mich. 297.
3. Evidence of what Hile said about the cull lumber, in connection with the scaling he was making for plaintiff, was admissible as part of the *res gestae;* citing 1 Greenl. Ev. § 113; *Cleveland v. Newsom,* 45 Mich. 62; *Joslin v. Ice Co.,* 53 Id. 322; *James v. Mining Co.,* 55 Id. 335, 345.
4. Under the circumstances, to exclude all evidence not in accordance with the terms of the contract as to measurement would be equivalent to denying all remedy; citing *Grice v. Noble,* 59 Mich. 515.

CAMPBELL, J. Plaintiff sued defendant on his promissory note to plaintiff's order for $400 and interest, dated at East Saginaw, November 30, 1885, and payable in 60 days. Defendant's plea was, in substance, that it was an accommodation note, given in renewal of a previous note

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for the same purpose, made by Eastman and indorsed by defendant. There was also a notice of set-off.

The defense, which in part prevailed, was on a somewhat different theory, to the effect that the note was given for an assumed balance, which was excessive. Plaintiff had judgment for only $80.50, and he brings error.

There were some not disputed facts out of which the controversy arose, as well as some disputed ones, on which questions of evidence and some other legal questions were raised.

On the 23d day of November, 1883, Cleaver undertook for the sum of $6 a thousand to cut and saw into lumber the white pine on certain lands in Delta county, converting the logs of 12, 14, and 16 feet long into such thicknesses as plaintiff should direct, using all care and diligence to avoid waste, using an edger, and keeping the lumber uniform in thickness and width, and turning the logs, when necessary to make the most valuable stock. He was further to haul it to the railroad side track at Beaver station, and pile and roof it accessible to the cars, in order for loading. The price per thousand was to be given "as evidenced by measurement of the same when shipped." Payments were to be made as Cleaver wanted them, but plaintiff reserved the right to keep back sufficient amount to keep himself safe.

Defendant sawed a certain disputed quantity of lumber, and delivered it in the first part of the year 1884. Plaintiff claims that on an adjustment of their accounts in August, 1884, defendant was found to have been overpaid to the extent of nearly $800, for which he gave plaintiff a note for $400, and another for $300; plaintiff allowing for a disputed sum further. After some renewals, the bank preferred to take plaintiff's own note as principal debtor, and accordingly defendant indorsed it. After

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further renewal, the note in suit was, as plaintiff claims, given for the same amount, in proper form, as defendant's own liability. Plaintiff's theory was that defendant sawed not more than 400,000 feet, of which a part consisted of mill culls. Defendant claims that he cut enough more to put plaintiff in his debt, and that this note was for plaintiff's accommodation. The difference would amount to considerably more than 100,000 feet. Plaintiff had the lumber measured just before shipment and after arrival at its ultimate destination, and it fell considerably short of 400,000 feet. This measurement was communicated to defendant, as appears from a letter of defendant, before July 7, 1884; and in that letter he did not dispute its correctness, or that of the account for advances making up the statement, showing a balance due of over $600. That letter was written July 2, 1884. A previous letter of June 17 enclosed a memorandum of measurements, and told defendant if he was not satisfied with the measurement of Mr. Hile he could have it measured at Escanaba, where it was to be sent for water carriage; that danger from fire made it necessary to send it forward.

If defendant got either of these letters,—one of which is shown by his own letter to have been received,—and made no objection to it, there would appear to be no basis for his defense. It does not appear very distinctly that he made any such objection before closing up the securities. But this question of fact we need not consider now.

Defendant's claim was that he cut some 600,000 feet of logs, which were all sawed and delivered, and that wastage would not reduce the product to much, if any, less than 500,000 feet; so that plaintiff was in his debt. He also claims that a parol agreement was made to have a joint measurement at Beaver station, and that the shipments were premature.

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There are a good many errors assigned, but we shall only refer to the most important.

We do not think defendant could properly be allowed to show what logs he claimed to have cut. The contract was express that the product only was to be measured "when shipped." There was no occasion, therefore, for any measurement by scaling in the woods; and the testimony actually given of such scaling was very inexact. Defendant's own letters show that a good deal of the cork pine was unsound, and there was testimony further of considerable wastage otherwise. There was no apparent reason for guessing, when, besides the measurement of Mr. Hile, which was criticised, the lumber was shipped at Escanaba, and must have been measured when loaded, and when discharged. This testimony, as offered and put in, was not made relevant, and should have been excluded.

We see no reason why plaintiff should not have been allowed to show why the notes for defendant's balance, as he claimed it to be, were, for purposes of discount, made nominally by plaintiff to defendant's order. As between each other it is competent to show who was principal and who was surety. More or less testimony on this question got into the record on defendant's issue. We think plaintiff had a right to show all the facts.

One Kaskinette was allowed to give some very vague testimony in regard to methods of measurement adopted by Hile. He showed no knowledge which would qualify him to explain or correct this measurement, and what he said was mostly not testimony. He was also allowed, as we understand the record, to show some purely irrelevant matters, which may have tended to confuse the issues.

Mr. Eastman was not allowed to answer this question:

"You may state whether or not it was agreed between you, when that matter was settled, that it was a final settlement."

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This was really the most important issue in the case. It appeared that plaintiff, to reach this settlement, made various concessions beyond what he claimed he was bound to make, in order to bring it about. There was strong evidence from which no other conclusion could be drawn, but it was nevertheless a point on which defendant raised a dispute, and had himself testified. It was clearly admissible.

The record is incumbered with more or less irrelevant matter, which was objected to. But it is so manifest from the result that the jury must have become confused in some way, and probably by the more important features of the controversy, that we need not go further into matters not likely to come up again.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

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THE PEOPLE v. EUGENE BURKHARDT.

Criminal law—Malicious injury to building.

This case is ruled by *People v. Petheram*, 64 Mich. 252, there being evidence (see opinion) from which the jury could infer malice, it being the natural inference from the facts proved.

Error to recorder's court of Detroit. (Swift, J.) Submitted on briefs October 17, 1888. Decided October 26, 1888.

Respondent was convicted of malicious injury to a building, and sentenced to State prison for four years. Judgment affirmed. The facts are stated in the opinion.

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James D. May, for respondent.

Moses Taggart, Attorney General, and *George F. Robison*, Prosecuting Attorney, for the people.

CHAMPLIN, J. Burkhardt was convicted of willfully and maliciously injuring a certain building, to wit, the building of Aletta A. Craig, No. 90 Alfred street, in the city of Detroit, by cutting lead pipes, tearing off faucets, and breaking plaster therein, to the damage thereof of $120.

The people gave evidence tending to show that on the 14th day of October, 1887, the defendant was seen in the building mentioned in the information, which was an unoccupied dwelling-house. Later in the day he was seen getting over the back fence of the yard in which the building was, with a bag on his shoulder. He was followed, when he dropped the bag, and ran away. In the bag were found a lot of lead pipe and brass faucets, which had been cut and torn from the aforesaid building. It was shown that on the day previous the house was in good condition.

George W. Snover testified that he examined the house the afternoon of the 14th of October, and found that the lead pipe and the small connections, and the lead pipe that runs into the wash-stand, and the wash-stand pipes, and the faucets in the bath-room, had been stripped and taken from the house, and the lead-pipe that had formerly been left in had been taken, and the ceiling was broken through, and there was considerable damage done to the plastering and walls.

The following question was asked of the witness, and his answer given:

"*Q.* What else was there that attracted your particular attention in the house besides the lead pipe that was gone, and the faucets that were taken out, and the plastering that was broken?

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"*A.* From the plastering or ceiling in the hall they tore that open, and they tore the zinc from the wash-basin that was of no value to them, but they didn't take it away, and they tore it out and destroyed them, and of course they had to be put back; we had to have new ones put in. They tore up the zinc in two of the wash-basins; but they didn't carry it away. They had wrenched the doors off two of the wash-basins, and in doing this they didn't show any skill in taking the things out; they did considerable damage to the moulding, plastering, and papering, and the wood-work about the wash-basin."

This witness testified that he was agent for the rental of the house; that he did not know the defendant, and had no reason to believe that defendant had any malice towards the owner of the house. The testimony tended to show that the damage done the house was $125.

The defendant's attorney requested the court to charge the jury that no evidence of malice had been given, and that they must acquit the defendant; which request was refused, and the defendant excepted; and this refusal constitutes the only allegation of error.

This case is ruled by that of *People v. Petheram*, 64 Mich. 252 (31 N. W. Rep. 188). There was evidence from which the jury could infer malice. It was the natural inference from the facts proven.

The judgment must be affirmed.

The other Justices concurred.

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THE PEOPLE v. CHARLES ETTER AND LEWIS ETTER.

Criminal law—Prosecution by private attorney—Certiorari—Return of justice.

1. Where a prosecuting attorney had instructed a justice to entertain actions where security for costs had been filed, and named an attorney whom he desired to represent him, who appeared at the request of the justice, and conducted the trial of a case before him in which such security had been filed, such action is no ground for reversal on *certiorari*, it not appearing that the attorney appeared for, or was acting in the interest of, any private party, and no objection being made to his appearing.
2. On *certiorari* from a conviction before a justice of the peace the respondent can claim no error not shown by the return.
3. Under the settled practice in this State, a justice's return of what he *knows officially* must determine the result on *certiorari*. *Alt v. Lalone*, 54 Mich. 302.

   So *held*, where an affidavit for *certiorari* in a criminal case charged that the attending officer remained with the jury during their deliberations, and the justice returned that he had no *personal* knowledge on the subject, but since the trial had been informed by some of the jurors that the charge was true.

Error to Cass. (O'Hara, J.) Argued October 17, 1888. Decided October 26, 1888.

Respondents were convicted of larceny, and on *certiorari* to the circuit court the judgment of the justice was affirmed. Judgment affirmed. The facts are stated in the opinion.

W. J. Sampson and *J. R. Carr*, for respondent.

Moses Taggart, Attorney General, and *F. J. Atwell*, Prosecuting Attorney, for the people.

[The points of counsel and authorities cited are stated in the opinion.—REPORTER.]

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CHAMPLIN, J. Defendants were tried and convicted before a jury in justice's court of the crime of larceny, and each sentenced to pay a fine of $50, and to be each imprisoned in the county jail 60 days.

Defendants sued out a writ of *certiorari* from the circuit court upon the errors alleged, as follows:

1. Because the suit against them was not conducted by the prosecuting attorney of the county, and no authority was shown by the attorney who appeared for the people to prosecute the same.
2. Because the officer who arrested defendants was a witness, and testified against defendants upon the trial, and such officer had charge of the jury while deliberating upon their verdict, and remained in the jury-room in the immediate presence of the jury during the entire time of their deliberation.
3. Because the sentence was indefinite.
4. Because there is a variance between the sentence pronounced by the justice and that set forth in the commitment.

The justice made return to the writ, from which it appears that the attorney who prosecuted the defendants appeared at the request of the justice; that in a conversation with the prosecuting attorney he had instructed the justice to entertain actions when security for costs had been filed, and in the selection of prosecutor he named the attorney who prosecuted in this case. There was no objection made to the appearance and prosecution by the attorney in behalf of the people, and it is not alleged in the affidavit for *certiorari* that the attorney appeared for, or was acting in the interest of, any private party. Security for costs was filed before the warrant was issued. The first assignment of error must be overruled.

To the second assignment of error the justice returned that the officer was sworn as a witness, and was also sworn to take charge of the jury, and as to the fact alleged that the officer remained in the presence of the jury dur-

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ing their deliberations he had no personal knowledge; that since the coming to him of the order for a further return upon that point he had interviewed four of the jurors, who informed him that the officer remained in the room. This allegation of error in the affidavit was supported by the affidavits of two of the jurors, which were annexed to the affidavit for *certiorari*.

When a person is convicted of a criminal offense before a justice of the peace, and conceives that injustice has been done him, he has a choice of two remedies,—he may appeal to the circuit court, where a retrial will be had upon the merits; or he may remove the conviction into the circuit court by writ of *certiorari*. If he chooses the latter remedy, he elects to rely upon such return as he may be able to obtain from the justice, and he can claim no error that is not shown by the return.

In *Alt v. Lalone*, 54 Mich. 303 (20 N. W. Rep. 52), which was a case for an assault tried before the justice, one of the objections was the presence of the sheriff during the deliberations of the jury, and the justice returned that he had no knowledge of this alleged fact, but had heard of it afterwards. This Court said:

"Under our statutes, a justice cannot grant a new trial, and has no power to inquire into what takes place outside of his knowledge. If nothing is returned on his knowledge which would affect a judgment prejudicially, it cannot be reversed on *certiorari*. The fact that he may have heard of something which he has no means of searching out, can have no more importance than if any one else reported similar matters. Under the settled practice in this State, a justice's return of what he knows officially must determine the result of a *certiorari*. There is no authority to go beyond this."

To the same effect are *People v. Hobson*, 48 Mich. 29 (11 N. W. Rep. 771), and *Galloway v. Corbitt*, 52 Id. 460 (18 N. W. Rep. 218).

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The third and fourth assignments are not relied upon by defendants' attorney. They have no foundation, as appears by the return of the justice.

The judgment of the circuit court must be affirmed, and the sentence of the justice carried into execution.

SHERWOOD, C. J., CAMPBELL and LONG, JJ., concurred with CHAMPLIN, J.

MORSE, J., *(dissenting).* In this case I think the amended return of the justice properly and sufficiently shows that the officer remained with the jury during their deliberations. Therefore the judgment ought to be reversed, and respondent discharged.

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THE PEOPLE v. PETER PRAGUE.

Criminal law—Information for assault with intent to murder—Conviction of lesser offense—Evidence—Deposition taken on preliminary examination.

1. Under an information charging the respondent with an assault with intent to murder, he may be legally convicted of the lesser offense of an assault with intent to do great bodily harm less than the crime of murder.
2. The deposition of a respondent, taken upon his preliminary examination, may be introduced in evidence by the prosecution upon the trial.

Error to Chippewa. (Steere, J.) Argued October 17, 1888. Decided October 26, 1888.

Respondent was informed against for assault with intent to murder, and convicted of assault with intent to do

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great bodily harm less than murder. Judgment affirmed. The facts are stated in the opinion.

J. W. McMahon, for respondent.

Moses Taggart, Attorney General, for the people.

CHAMPLIN, J. The information charged defendant with an assault with intent to murder. He was tried and convicted of the statutory offense of committing an assault with intent to do great bodily harm less than the crime of murder.

Defendant is an Italian, unable to understand or speak the English language, and on July 8, 1887, while in company with another Italian, whom he called his "partner," while on board the steamer China, bound up the lakes, a row occurred between defendant or his partner and the first cook of the vessel, and in the *melee* one of the Italians, claimed to be the defendant, cut a man named Gleason,—who was third cook, and was endeavoring to separate the combatants,—once on the outside of the left shoulder, and once on the body behind the shoulder, with a knife. The wounds were not serious, merely cutting through the skin and into the muscles slightly.

After charging the jury what it would be necessary for them to find in order to convict defendant of the crime charged in the information, the court proceeded to instruct the jury as follows:

"If the jury find that the defendant committed an assault upon Edward Gleason, and do not find that the assault was committed with the intent to commit the crime of murder, but do find beyond a reasonable doubt that the defendant, at the time and place alleged, committed an assault upon the said Edward Gleason, with intent to do great bodily harm less than the crime of murder, then the defendant may be convicted of an assault upon Edward Gleason with intent to do great bodily harm less than the crime of murder. And should

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you not find the defendant is shown to have committed an assault with either an intent to murder or to do a great bodily harm less than murder, but should find it shown beyond a reasonable doubt that on the occasion in question he assaulted and struck Gleason unlawfully, you may find him guilty of assault and battery."

Under this charge the jury found defendant guilty, as before stated. The attorney for defendant assigns this as error, and insists that it is not an offense named in the information, and upon which he has had no examination; in other words, that defendant was charged in the information with one offense, and was convicted of a substantially different offense.

Where the offense embraces different degrees, and the highest degree is charged, it has been held that the person charged may be convicted of any of the lesser degrees. Thus, if charged with murder in the first degree, he may be convicted of murder in the second degree, or of manslaughter, or of assault and battery. The reasons are that the offense springs from the same transaction, and is supported by the same class of testimony. The crime of an assault with intent to commit the crime of murder is one of a higher grade and greater enormity than the crime of assault with intent to do great bodily harm less than the crime of murder. It belongs to the catalogue of offenses against the lives and persons of individuals, and we think the charge was authorized by the opinion of this Court in *Hanna v. People*, 19 Mich. 316.

In *People v. Sweeney*, 55 Mich. 586 (22 N. W. Rep. 50), we held that these two offenses set out in two separate counts might be joined in the same information, and, if this can be done, an information charging the greater offense will support a conviction for the lesser, based upon its commission at the same time, place, and circumstances.

The objection made to the introduction of the deposi-

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tion of defendant, taken before the examining magistrate, is ruled by *People* v. *Arnold*, 43 Mich. 343 (5 N. W. Rep. 385), and *People* v. *Estes*, 59 Id. 559 (26 N. W. Rep. 702).

It follows that the judgment must be affirmed.

The other Justices concurred.

THE PEOPLE v. JOHN HICKS.

Criminal law—Justices' courts—Trial—Verdict—Practice.

It is error to allow a prosecuting attorney, after a jury in a criminal case in justice's court have announced their inability to agree, to question them as to the cause of such disagreement, and to read law to them, and state to them what verdict they may legally render, the defendant not consenting but objecting to such action.

Error to Gratiot. (Hart, J.) Argued October 17, 1888. Decided October 26, 1888.

Respondent was convicted in justice's court of an assault, which conviction was affirmed on *certiorari* at the circuit, and is reversed on error. The facts are stated in the opinion.

W. A. Bahlke, for respondent.

Moses Taggart, Attorney General, and *B. H. Sawyer*, Prosecuting Attorney, for the people.

MORSE, J. Hicks was prosecuted before Almon Yerington, a justice of the peace of Arcada, Gratiot county, upon a criminal complaint for assault and battery. Upon the first trial the jury disagreed.

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At the second trial, after hearing the proofs, the jury retired to deliberate upon their verdict. After being out some time, they returned into court, and reported they were not able to agree. The justice then said to them: "The jury is discharged." Thereupon the prosecuting attorney requested the court not to discharge the jury, as he wished to examine them. The justice returns that he granted this request.

"The jury did not rise from their seats, and the prosecutor then asked them the following question: 'Are you unable to agree for the reason of any law that has been introduced?' which was objected to by defendant's counsel as incompentent, improper, immaterial, and irrelevant, and the objection overruled."

The foreman of the jury replied:

"The jury is not clear as to whether they can find a verdict as to assault and battery, or assault, either or both."

The defendant's counsel then asked a discharge of the jury, which was refused. The prosecuting attorney then stated the law to the jury, and informed them that they might find the defendant guilty of assault and battery, or assault alone, as the facts appeared to them, and that assault and battery included an assault. He also read the law as found on page 572, Tiff. Crim. Law. This was done against the objection of defendant's counsel, who insisted that the jury should be discharged.

"Prosecuting attorney asks court to ask the jury that if after they have heard the law whether they think they will be able to agree if they retire. Defendant's attorney objects as incompetent and immaterial. Court asks the question. Jury respond in the affirmative."

The court then directed the jury to retire, which they did. Soon after they returned with a verdict of guilty of assault. The defendant's counsel then objected to the verdict, but was overruled by the court, who rendered

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judgment that Hicks should pay a fine of $20, and $38.38 costs, within four days, and in default thereof to be imprisoned in the county jail for 30 days.

The case was taken to the circuit court by writ of *certiorari*, and there the judgment was sustained. The justice returns that, although he told the jury they were discharged, he did not "formally discharge" them.

It is claimed by the Attorney General that either party has a right to poll the jury at any time before the verdict is recorded, and that the action of the prosecuting attorney amounted to no more than this. But the jury had rendered no verdict; and the prosecuting attorney, without the consent of the defendant, had no business to interfere with the jury at all until after verdict. The justice might have read the law to them, and sent them back, had he so desired; but here the prosecuting attorney took the matter into his own hands, and questioned and instructed them before their deliberations were ended, and after they had commenced deliberating upon their verdict.

It is also contended that no harm was done in a simple statement of the law to them. It seems, however, that the action of the prosecutor resulted in a verdict against the defendant, which result was not reached until after the interference of the prosecutor. There can be no excuse for the conduct of the prosecutor and court in this case. They went beyond the law, and, although their motives were good, the result reached was an unlawful one.

The verdict and judgment must be set aside, and the respondent discharged.

The other Justices concurred.

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THE PEOPLE v. JAMES K. PERRIMAN.

Criminal law—Information for bigamy—Amendment—Witnesses—Indorsement of names upon information—Private attorney assisting prosecutor—Proof of marriage—Copy of records.

1. The amendment of an information for bigamy by leave of the court on calling the case for trial, by changing the name of the county where the first marriage is alleged to have taken place to that of another county in the same state, is not improper, no claim being made that such amendment necessitated a continuance to enable the respondent to go to trial safely.
2. While there are some reasons why the place as well as time of the first marriage should be given in an information for bigamy, it is apparent that the only important fact is the existence of the two marriages.
3. It is quite possible for a valid marriage to be shown with no means to show its time and place, and this is especially true of marriages in distant places.
4. While fairness requires that no needless delay should occur in placing on the information the names of known witnesses, yet it cannot be made an absolute requirement in cases of such a nature as the present, where the prosecution cannot compel attendance.
5. There is no question that the testimony of eye-witnesses to a marriage is more direct and reliable in most cases than documentary evidence, which has never been regarded as in law the best evidence.
6. A witness who swears to seeing a man and woman joined together by a marriage ceremony, performed seriously and in earnest, by a person acting in the character of a clergyman or magistrate, testifies to what is a valid marriage, unless clearly made illegal by statute.
7. According to all rules of law, official character, whether lay or clerical, can be shown presumptively by reputation.
8. While there may be countries where marriages are void unless solemnized by a person having actually the authority to perform them, such is not the general rule, and such is not our law.

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9. A paper purporting to be a certificate of a marriage solemnized in another state, and certified by the clerk of the county to be a true and perfect copy of such certificate as the same appears from the records in his office, but which is not certified as required by the act of Congress, and does not conform to any rule of this State on the subject, is inadmissible as evidence of such alleged marriage in this State.

10. Where an attorney appointed on the request of the prosecuting attorney to assist in the prosecution of a criminal case testifies that he is acting under an agreement that the prosecutor shall pay him for his services, and that he has received no money, nor made any arrangements to receive any, from any other person, there is no rule making it necessary to exclude him.

Error to superior court of Grand Rapids. (Burlingame, J.) Argued October 17, 1888. Decided October 26, 1888.

Respondent was convicted of bigamy, and sentenced to State prison for five years. Judgment affirmed. The facts are stated in the opinion.

Ward & Ward, for respondent, contended:

1. The amendment of the information changed the cause of action, and if proper at all the better practice required that a new information, properly verified, should have been filed; citing How. Stat. § 9550; *Lewis v. State*, 17 N. W. Rep. 366 (Neb.).

2. In support of the objection to indorsing names of witnesses on the information, counsel cited How. Stat. § 9549; *People v. Hall*, 48 Mich. 487.

3. The answers of Mr. Maynard left it clearly to be understood that for services already performed in the case he expected compensation from third parties, and it was error to allow him to act in the trial; citing How. Stat. §§ 551, 557; *Meister v. People*, 31 Mich. 99; *Sneed v. People*, 38 Id. 248; *Ulrich v. People*, 39 Id. 245; *People v. Hurst*, 41 Id. 328; *People v. Cline*, 44 Id. 291.

4. It was error to permit the witness Cowen to state his conclusions that a marriage took place, instead of requiring him to state what was said and done, and leave the conclusions for the jury to draw. Besides, there was better proof, and no excuse was shown for not making record proof, or calling the minister who performed the ceremony. The laws of Arkansas require a record to be kept of all marriages, and if not found

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where, if in existence, it ought to be deposited, the presumption arises that it never existed; citing *Platt v. Stewart*, 10 Mich. 260; *Hall v. Kellogg*, 16 Id. 135.

W. J. Stuart, Prosecuting Attorney (*Stuart, Knappen & Van Arman*, of counsel), for the people.

1. The amendment of the information was within the express language of the statute of amendments; citing How. Stat. § 9537; *People v. Mott*, 34 Mich. 80; *People v. Henssler*, 48 Id. 49; *People v. Calder*, 30 Id. 85.
2. No objection to lack of reverification was made, and an objection to lack of verification is waived by not raising it until after jury are sworn; citing *Mentor v. People*, 30 Mich. 91; *Lambert v. People*, 29 Id. 71.
3. The marriage certificate alone was not the best evidence of the marriage, and standing alone was inadmissible in this case; citing *People v. Lambert*, 5 Mich. 349, 364; and it was proper to prove the marriage by the witnesses who attended it.
4. Parol evidence that the officiating minister publicly, and in the presence of other persons in attendance, in fact performed what purported to be a ceremony of marriage between the parties, who appeared to regard themselves as then married, is sufficient to establish a presumptively valid marriage, without proof of the particulars of the ceremony, or of the specific requisites of a lawful marriage ceremony according to the forms or usages or customs of such church; citing *People v. Calder*, 30 Mich. 85; *Fleming v. People*, 27 N. Y. 329.
5. Any one present at the marriage is as competent a witness as the officiating minister; citing *State v. Robbins*, 6 Ired. 23; 1 Bish. Mar. & Div. § 494, and cases cited in note.
6. Evidence that the officiating minister is a *de facto* clergyman is sufficient; citing 1 Bish. Mar. & Div. § 495.

CAMPBELL, J. Respondent was convicted of bigamy in marrying, at Grand Rapids, one Louisa A. Love, while having another wife living, and not divorced. The information charged the former marriage to have been had with one Roxy L. Cowen, in Izard county, Ark., at a time less than a year before the latter one, giving the date properly. On the calling of the case, and before trial, the prosecutor had leave granted to change the name of the county in Arkansas to Fulton county. This

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was objected to, but the objection was overruled. We do not think the amendment improper. No showing or claim seems to have been made that a continuance was made necessary by it to enable respondent to go to trial safely. While there are some reasons why the place as well as time of the first marriage should be given, it is apparent that the only important fact is the existence of the two marriages. It is quite possible for a valid marriage to be shown with no means to show its time and place. This is especially true of marriages in distant places. If there has been a prior marriage, there are generally modes of proof quite satisfactory, as by eye-witnesses, when their memory may fail entirely as to the exact circumstances, without shaking their credibility. The amendment does not seem to us to be ground of reversal

It is also assigned as error that the prosecutor added the names of Robert Cowen and William Cook to the names of witnesses indorsed on the information by leave granted in court before trial, without any sufficient showing that they were not known before. To this it may be answered that no application was made for continuance on that ground. But it appears that these witnesses lived in Arkansas, and were beyond reach of process from this State, so that a knowledge of their materiality would not have insured their attendance. While fairness requires that no needless delay should occur in placing on the information the names of known witnesses, yet it cannot be made an absolute requirement in cases of such a nature as the present, where the prosecution cannot compel attendance.

Several questions relating to proof of marriage may be considered together. There is no question that the testimony of eye-witnesses to a marriage is more direct and reliable in most cases than documentary evidence, which

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has never been regarded as in law the best evidence. Unless there is something to identify the parties, there is always a possibility of mistaken identity, which is avoided by direct proof by observers. And we have no doubt that a witness who swears to seeing a man and woman joined together by a marriage ceremony, performed seriously and in earnest, by a person acting in the character of a clergyman or magistrate, testifies to what is a valid marriage, unless clearly made illegal by statute. No statute of Arkansas, so far as we can discover, requires any greater proof of a valid marriage. The statute, as produced to us, seems directly to authorize marriage to be so solemnized; and, according to all rules of law, official character, whether lay or clerical, can be shown presumptively by reputation. And while there may be countries where marriages are void unless solemnized by a person having actually the authority to perform them, such is not the general rule, and such is not our law. It would be a dangerous thing to subject parties acting on the faith of a valid ceremony to have their marriages avoided by some unknown defect in the official character of the person who officiated. In the present case, no such doubt appears warranted by anything in the record. We think there was no error in receiving the testimony given concerning the license and bond. It came from the proper source, and was proved by a proper witness, and was corroborative of the testimony of the eye-witness, if it needed corroboration.

An attempt was made to show a marriage existing between respondent and another woman than Roxy Cowen at the time he married her, so as to avoid the charge that Roxy was his wife. Without considering the oral testimony offered on this subject, which appears to us to have been properly considered below on the trial, it does not seem to us that there was any error in shutting out the

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certificate of that marriage, which was not certified as required by the act of Congress, and did not comform to any rule of our own on the subject. The jury do not appear to have believed the oral testimony, and we cannot review their incredulity. The court charged them very fairly on the subject.

The prosecution proved, by testimony which the jury could not have disbelieved without perverseness, that respondent was married to Roxy L. Cowen in February, 1886, and to Louisa A. Love in November, 1886. There was no way to meet this, except by invalidating one or both of these marriages. The first marriage was attacked by attempting to show one or two earlier ones, the alleged wife in one of which was not divorced. The jury did not believe the testimony on that head. An attempt was also made to show respondent's insanity. The respondent himself, his daughter, and some medical witnesses, appeared to sustain this defense. The facts positively shown by the prosecution were not controverted except by want of recollection, out of which the insanity was sought to be made out. This reliance on want of memory was not much aided by the experts, who had not much faith in its truth, and, so far as they gave opinions, did it chiefly on other grounds. Upon the purely medical questions, which were not many, the witnesses differed, and their credibility was for the jury. The testimony for respondent on these points did not give very tangible grounds in such a way as to enable other experts to test their character or tendency. The principal medical witness for the defense assumed to direct the course of most of his own examination, and to declare certain letters and other things insane acts, which the jury have as much capacity to interpret as he had, and on which their judgment was to be exercised. An examination of these letters does not to an ordinary mind indicate anything

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more than a lively imagination, such as might be useful to a person running a small show, as defendant seems to have been; but they may have been true for anything shown on the subject, and if not true were as possibly lies as delusions. The letters indicated beyond doubt that respondent considered himself to be the husband of Roxy, and wrote as a husband of not very extreme delicacy might have done, and as the jury have found he did.

It was going as far as justice required to let the question of insanity at the time of the first marriage go to the jury at all, and, as the case stood, we do not think the expressions of the trial judge concerning expert testimony require any censure or animadversion. There was nothing in the charge to prevent the jury from finding respondent insane if they believed he was, but they evidently had no such idea, and it was for them to say.

Objection was made to the employment of Mr. Maynard to aid the prosecution. He was fully examined, and there was nothing which under our rulings made it necessary to exclude him.

There was complaint made of some of Mr. Maynard's language in addressing the jury. The court in charging the jury gave them all the instruction necessary upon the subject; and there is not only no certainty that he made the remarks complained of, but the caution given by the judge when the matter was brought to his attention was fully sufficient to rectify it if he had gone as far as was claimed. There was abundant evidence to justify Mr. Maynard's belief in defendant's bigamous proclivities, and we do not see any reason to criticise the action of the court in disposing of the objection, and confining the jury to the specific issues before them.

There are some other objections presented by the able and zealous counsel for the defense, but none of them appear to us important enough to be noticed further.

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They come within familiar rules. The judge who tried the case did so with great fairness, and his rulings contain nothing that can be complained of by respondent.

The judgment must be affirmed.

The other Justices concurred.

WILLIAM T. MCGRAW v. ABRAHAM LAPHAM.

Bailment—Deposit of money—Liability of bailee.

In this case it is held that the defendant held the money sued for as bailee of plaintiff's assignor, and is liable to plaintiff for the same.

Error to Wayne. (Gartner, J.) Argued October 19, 1888. Decided October 26, 1888.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Charles Flowers, for appellant.

W. L. Carpenter (A. C. Angell, of counsel), for defendant.

CAMPBELL, J. In this case plaintiff sued defendant for the amount deposited with him by Fred D. Smith, and assigned to plaintiff. The court below ordered a verdict for defendant.

Plaintiff showed by Smith that in October, 1887, he had $1,000, the proceeds of a drug business that he had sold out, and which, on Smith's going to California to look up an establishment there, he left behind him in Wayne county, with his wife, and before going he asked

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defendant to take it and keep it till she should come to California, when she would bring it to him. This the defendant said he would do. Mrs. Smith died during his absence, and he did not hear of it until he returned in December. He then called on defendant to get such balance as would remain after deducting what defendant had paid out, and remuneration for his services. They figured up items for funeral expenses, doctor's bills, and some other things, including two items of $50 and $25 sent Smith while in California, and $15 paid him after his return. After getting at what should be deducted, defendant said he was not just ready to settle then, but would be in shape the next week to pay him the balance of the money, which he admitted he had. There were a few small items, on which Smith also testified.

Smith further testified that his wife had no other money beyond a few dollars.

On cross-examination Smith identified a letter which he wrote to his wife in November, 1887, which contained this language:

"DEAR WINNIE: Many thanks for the $25. I am sorry to have called upon you for it, but I hope to be able to send it back soon. Concluding by your not sending the $200 that you had assumed the management of affairs, I take pleasure in tendering you my best wishes, and if I can be of any assistance, I will be pleased."

A part of another letter, the date of which is not given, and which was not allowed to be read in full, was as follows:

"Your letter received. I am very sorry you are having so much trouble. But do not worry. They cannot take your money if they knew you had it. I will send a letter to the storage company, and also an order to you, and if you feel like it I would start for California. I guess we can make a living here. I would not worry so much about spending your money. I can easily make as much more here in fly-paper alone next summer. It, of

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course, is taking some money to get straightened around; but that is nothing more than I expected. You seem to feel as though that would be all we would ever have. I made that where it is hard to make it, and here, where they make money easy, it ought not to be hard."

The court shut out some letters, the contents of which do not appear in the bill of exceptions. It appeared that Smith telegraphed to his wife for $200, and that she did not send it; but defendant sent such money as was sent, sending the $50 in reply to a telegram to him personally, which turned out to be after Mrs. Smith's death, of which Smith was not then informed.

Defendant put in no testimony.

We are unable to see any reason why plaintiff should not have recovered what he claimed. The testimony is clear that the money belonged to Smith, and that Lapham knew it, and so treated it. The letters shown have no tendency to show that Smith ever gave it to his wife. The utmost that they tend to show is that Mrs. Smith had some fears about spending money, and assumed some restraint on it, which Smith was good-humored enough not to quarrel about. But they have not the slightest tendency to show that he had parted with his own property. The bailment of Lapham was one in which he acted by agreement with Smith, and never denied or doubted his interest. The bills paid, or intended to be paid, were Smith's bills, on which he, and not his wife, was liable, and which could only be deducted by his consent, which, it appears, he gave. Lapham was bound to pay him the money.

It is to be regretted that we are not able to give judgment on the record. The defense is unconscionable, and without any legal foundation. The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

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ARTHUR MEIGS AND RICHARD G. PETERS v. HENRY C. MCFARLAN.

Land contract—Mortgage—Bill to redeem.

1. An assignment of a land contract, with a defeasance that if the assignee should be obliged to pay any part of a specified sum for which he had become surety, and the assignor should not repay the same by a given date, the assignee should have absolute ownership in the contract, and if repaid he was to surrender all claim thereto, is a mere mortgage of the land, and no more.
2. The practice in this State on bills to redeem has long been settled against strict foreclosure in case of default, unless in very peculiar cases.
3. In this case the defendant took an assignment of a land contract as security, and without a demand of complainants, who had succeeded to the rights of the vendee, for the amount due him, demanded and received a deed of the land from the vendor, and then took possession of the premises, and refused complainants' offer to pay the amount secured by the assignment, claiming to be the absolute owner of the property. On this state of facts complainants are allowed to redeem on paying amount of defendant's claim, including some taxes paid on the property, less the rental value of the same during defendant's unlawful occupancy, and are allowed costs of both courts.

Appeal from Wexford. (Aldrich, J.) Argued October 19, 1888. Decided October 26, 1888.

Bill to redeem. Complainants appeal. Decree modified and affirmed. The facts are stated in the opinion.

Smith & Stevens, for complainants, contended:

1. Possession is always notice of whatever rights the party may have; citing *Russell v. Sweezey,* 22 Mich. 235; *Farwell v. Johnston,* 34 Id. 343; *Seager v. Cooley,* 44 Id. 18; *Allen v. Cadwell,* 55 Id. 8.
2. Defendant's assignment was a mortgage, and gave no right of

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possession except upon foreclosure; citing *Ferris v. Wilcox*, 51 Mich. 105; *Hurst v. Beaver*, 50 Id. 616; *Curtiss v. Sheldon*, 47 Id. 262.

3. A mortgagee is never entitled to possession except upon a foreclosure after default; citing *Baker v. Pierson*, 5 Mich. 456; *Caruthers v. Humphrey*, 12 Id. 270; *Crippen v. Morrison*, 13 Id. 23; *Van Husan v. Kanouse*, Id. 303; *Ladue v. Railroad Co.*, Id. 380; *Newton v. Sly*, 15 Id. 391; *Hogsett v. Ellis*, 17 Id. 351; *Wagar v. Stone*, 36 Id. 364; *Lee v. Clary*, 38 Id. 223; *Hazeltine v. Granger*, 44 Id. 503; *Ferris v. Wilcox*, 51 Id. 105.

4. The quitclaim deeds vested in complainants the rights of the vendee in the land contract, including the right to discharge defendant's lien by payment; citing How. Stat. § 5653; *Thayer v. McGee*, 20 Mich. 206; *Hoffman v. Harrington*, 28 Id. 90; *Kitchell v. Mudgett*, 37 Id. 84.

5. Failure to pay upon April 11, 1885, the amount of defendant's lien, did not justify a forfeiture of complainant's rights, nor preclude a subsequent payment; citing *Bomier v. Caldwell*, 8 Mich. 463; *Shafer v. Niver*, 9 Id. 253; *Morris v. Hoyt*, 11 Id. 9; *Richmond v. Robinson*, 12 Id. 193; *Converse v. Blumrich*, 14 Id. 109; *Kimball v. Goodburn*, 32 Id. 12; *Moote v. Scriven*, 33 Id. 500; *Stickney v. Parmenter*, 35 Id. 237; *Gram v. Wasey*, 45 Id. 228; *Voltz v. Grummett*, 49 Id. 453.

6. Forfeitures are not favored by courts, and equity will not lend its aid affirmatively or otherwise to carry them into effect, and no presumptions exist in their favor; citing *Crane v. Dryer*, 9 Mich. 350; *White v. Railway Co.*, 13 Id. 356; *Wing v. Railey*, 14 Id. 83; *Fitzhugh v. Maxwell*, 34 Id. 138; *Ortmann v. Bank*, 49 Id. 58.

7. A strictly legal tender is waived by a refusal to receive; citing *Ashburn v. Poulter*, 35 Conn. 553; *Thorne v. Mosher*, 20 N. J. Eq. 257; *Strong v. Blake*, 46 Barb. 227; *Hoyt v. Sprague*, 61 Id. 497; *Koon v. Snodgrass*, 18 W. Va. 320; *Brewer v. Fleming*, 51 Penn. St. 102; or by words or acts showing that it would not be received, or denying any liability under the contract; citing *Hanscom v. Hinman*, 30 Mich. 419; *Mattocks v. Young*, 66 Me. 459; *Duffy v. Patten*, 74 Id. 396; *Hopwood v. Corbin*, 63 Iowa, 218; *Guthman v. Kearn*, 8 Neb. 502; *Wright v. Young*, 6 Wis. 127; *Cunningham v. Brown*, 44 Id. 72; or if no objection is made at the time to the mode of tender; citing *Fosdick v. Van Husan*, 21 Mich. 567; *Beebe v. Knapp*, 28 Id. 55; *Browning v. Crouse*, 40 Id. 339; or when rendered impracticable and futile by the party otherwise entitled thereto; citing *Staat v. Evans*, 35 Ill. 455; *Cunningham v. Brown*, 44 Wis. 78; and it may be excused by a variety of circumstances, or by

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omissions of the party to whom it would otherwise have been made; citing *Lacy v. Wilson*, 24 Mich. 479; *Holmes v. Holmes*, 12 Barb. 137, 9 N. Y. 525; *Slingerland v. Morse*, 8 Johns. 474.

8. Defendant has been in wrongful possession of the premises, and has been receiving rents which in equity belong to the complainants; citing *Hazeltine v. Granger*, 44 Mich. 505; *Hack v. Norris*, 46 Id. 587; *Culbertson v. Young*, 50 Id. 198; *Crooks v. Whitford*, 40 Id. 599; and he stands in the position of their trustee, and is bound to account for the rents received; citing *Clarke v. Pierce*, 52 Mich. 157; *Cochrane v. Adams*, 50 Id. 16.

9. A party whose conduct causes the suit should pay the costs; citing *Spencer v. Spencer*, 11 Paige, 159.

10. When a mortgagee in a suit to redeem sets up an unwarranted or unconcientious defense, or claims the property as his own absolutely, and thereby makes costs and delay, he is chargeable with costs of suit; citing *Turner v. Johnson*, 95 Mo. 431; *Slee v. Manhattan Co.*, 1 Paige, 81; *Brockway v. Wells*, Id. 619; 2 Jones, Mtg. § 1111; *May v. Eastin*, 2 Porter (Ala.), 414; *Fleming v. Harrison*, 2 Bibb, 172.

Sawyer & Bishop, for defendant, contended:

1. The question of costs in chancery cases is discretionary, and is not subject to appeal.

2. The position of the parties was that of equitable mortgagors and mortgagees, and in such cases the mortgagee is entitled to possession; citing *Wetherbee v. Green*, 22 Mich. 321; *Bennett v. Robinson*, 27 Id. 26; *Jeffery v. Hursh*, 42 Id. 563.

3. Where complainants fail to tender, before suit, the amount to which defendant was equitably entitled, costs should be awarded against them; citing *McKenna v. Kirkwood*, 50 Mich. 544.

4. Tender before suit, as a basis for suit, may be, and frequently is, excused by acts or circumstances; but we are unable to find any decision holding that interest or costs can be affected without a legal tender.

CAMPBELL, J. This case was begun as one to redeem lands from an equitable mortgage.

On May 6, 1884, Ward P. Smith, of Manton, in Wexford county, sold by contract to Rachael Hyde, of the same place, the north half of lot 20, on the railroad plat of that village, for $250 and interest, payable in monthly installments of $10 each until paid. The contract provided that the grantee should have possession. There was

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no provision for paying sooner. All the installments falling due were paid. Mrs. Hyde built on the land.

On the 11th of August, 1884, Mrs. Hyde mortgaged this contract to defendant, McFarlan, by assignment in writing, containing a defeasance. The consideration stated was that defendant had become security for the payment of the contract (which was not done so as to make him personally liable), and for a credit given her of $300 with Hawkins & Perry, of Grand Rapids, and of $150 with McFarlan & White. The defeasance was that if he was obliged to pay any of said amount of $450, and if she should fail to repay it on or before April 11, 1885, then defendant was to have absolute ownership in the contract, but if she should pay all for which he became liable, then he was to surrender all claim thereto.

This is the usual purport of a common-law defeasance, and beyond doubt was a mere mortgage of the land, and no more. It contained no grant of possession, and Mrs. Hyde retained possession.

The case does not show that the defendant was ever compelled to pay any of the secured debts, but he testified he actually paid them, and no point is made on this.

January 14, 1885, Mrs. Hyde sold the land to the Manton Manufacturing Company, and it was put in possession, and its deed was recorded. On March 25, 1885, the Manton Manufacturing Company sold and conveyed the premises to complainants. Defendant knew at the time of the execution of this conveyance, and took the acknowledgment. Complainants at once went into possession. It does not appear that they or their grantor knew of the amount or precise nature of defendant's rights; but they do not claim that the mortgage was void as against them. This ignorance has, however, another bearing.

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Leaving out of view some facts which do not become very imporant, reference will now be made to the doings of defendant which rendered this bill necessary.

On the 11th day of April, 1885, without any demand on complainants, whose rights he knew in fact, as we are satisfied, and was bound to know from their open and notorious possession, as well as from his participation in the execution of the deed, of the nature of which he was notified at the time, and without any demand on Mrs. Hyde, who was the one personally liable on the debt, defendant went to Mr. Ward P. Smith, in company with Mr. Gilbert, and in Smith's presence demanded payment from Gilbert of what was due him on the mortgage. Gilbert, who had nothing to do with complainants, but had been connected with the Manton Manufacturing Company, told defendant he had nothing to do with it, and declined payment. It may be remarked that when the Manton Manufacturing Company bought of Mrs. Hyde it was unable to learn from her or her husband how much defendant claimed, and Mr. Gilbert, on going to defendant, and asking him the amount, with an explanation why he wanted to know, was refused any information on the subject.

When Mr. Gilbert disclaimed any liability in the interview with defendant on April 11, defendant turned to Mr. Smith, and said:

"These parties refuse to make payment on the contract, and I am ready now to pay up the balance that will become due on the contract, and take a deed, if you will give it to me."

Smith, who acted very carelessly in the matter, accepted this payment, which was not due, and could not have been lawfully demanded, and on the same day gave defendant a full and absolute warranty deed of the property. As Smith is not a party to this suit, and as defend-

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ant, McFarlan, is the person who brought about the transfer, and is responsible for it, we need not consider Mr. Smith's action further.

On April 16, 1885, Mr. Frank L. Roberts, who was in possession of the store for complainants, and selling out their stock of goods, had sold a bill of about $60 to defendant. In the afternoon of that day defendant and Ward P. Smith came in, and defendant asked Roberts if he knew that he owned the store. Roberts answered he did not know it. Defendant said he did own it, and wanted immediate possession. Defendant insisted on Roberts removing the goods at once, and refused to give him time to communicate by telegraph with William A. Smith, the representative of complainants at Grand Rapids. Roberts went out to see where he could place the goods, and in his absence defendant forcibly removed them himself, and locked Roberts out. Mr. William A. Smith, complainants' agent and counsel, was at once informed, and came up next day to Manton, and applied to defendant for information concerning his claim, and offered to pay whatever was due him. Defendant claimed that he was absolute owner, and refused to give any information. This bill was at once filed.

The court below held the claim of defendant to be a mortgage, and allowed a redemption. In the decree no interest was allowed on defendant's claim, but he was not charged with rents and profits, and not only was it decreed that, unless redeemed at the day specified, complainants should be absolutely barred, but gave costs against complainants. Complainants appeal.

It was clearly wrong to visit complainants with costs Defendant had refused to give them any means of knowing what was due him, and they could not find out from any one else how much it was. He refused to recognize any rights in them, and made it impossible for them to.

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tender him any sum whatever. They were not in fault for not making a tender, and he alone was responsible for the litigation. He should have been required to pay all the costs.

But we think the amount of the decree is erroneously computed. Defendant paid to Ward P. Smith $167.22. This amount was not due, but it would have become so, and is well enough. As he prevented complainants from knowing anything about it, and prevented them from making a tender of it, he could not equitably claim any interest on it whatever. The amount paid, as he claims, to Hawkins & Perry, was $294.99. The testimony concerning this payment is not in a very positive shape, but complainants are willing to accept the receipt as evidence of payment. The mortgage limited his payments to McFarlan & White to $150, and the mortgage was not made security for any more. He is only entitled, therefore, on these two accounts to $444.99. There is a charge in his bill for an item of painting, in 1887, during the pendency of this suit, of $45. There is nothing to explain this, and it should be rejected. There are tax items of $49.82, which appear to be fair charges. The dates when these were paid must all have been during this suit, as they are for taxes payable during that time. Interest, if allowed, can only run from their payment. At the time the bill was filed the sum due was $611.71. If interest should be allowed on this up to this time it would be $149.87 to October 30, 1888; and on the taxes about $5 more, making $154.87, as nearly as can be computed.

During all this time it appears that the building was worth $140 a year, which would make the whole rental value for three years and a half $490. When possession was taken, not only wrongfully, but by what was equivalent to force and fraud, no less compensation would be

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equitable. And allowing interest, which it is going very far to allow at all, it would leave a balance of rents and profits beyond interest of $335.13. Deducting this balance from his aggregate advances of $661.53, we have due him October 30, 1888, a final balance of $326.40, for which we will allow him a decree.

This allowance is only made on the ground that in a court of equity we are reluctant to enforce a forfeiture against him. His conduct was both audacious and fraudulent, and deserves no consideration or favor, and we are not at all sure that it did not forfeit his lien. But complainants, in their bill, offered to do equity, and come to an accounting, and we take them at their word, and require them to do equity. The amount we allow is sufficiently liberal under the circumstances.

The practice in this State on bills to redeem has long been settled against strict foreclosure in case of default, unless in very peculiar cases. In case the redemption money is not paid as decreed, the remedy will be by sale as on foreclosure. The decree in this case will be so framed.

Complainants are entitled to have the decree modified so as to conform to this opinion. They will recover costs of both courts. The decree, as amended by this Court, will be sent down for execution. The costs may be applied on the decree, if less than the sum found due. If greater, complainants will be entitled to the balance, to be collected in the usual way.

The other Justices concurred.

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LOUIS A. HALL ET AL. v. ROBERT D. PERRY.

Taxes—Law of 1885—Sale for taxes of 1882 and 1883—Validating act of 1887—Constitutional law.

1. The tax law of 1885 was prospective only in its operation, and a sale of land under its provisions for the taxes of 1882 and 1883 is absolutely void.[1]
2. Section 2 of Act No. 17, Laws of 1887, which attempts to validate sales made under the tax law of 1885 for taxes assessed prior to the passage of the act, is unconstitutional.
3. It is competent for the Legislature, by a retrospective statute, to cure defects in legal (tax) proceedings where they are in their nature irregularities only, and do not extend to matters of jurisdiction, unless expressly forbidden so to do; but the proposition that the Legislature can make good that which was void when done, is utterly at variance with the fundamental principles of law.[2]

Error to Marquette. (Grant, J.) Submitted on briefs May 1, 1888. Decided November 1, 1888.

Ejectment. Defendant brings error. Affirmed. The facts are stated in the opinion.

F. O. Clark, for appellant.

Ball & Hanscom, for plaintiffs.

LONG, J. This is an action of ejectment, brought by the plaintiffs against the defendant, in the circuit court for Marquette county, and, under the charge of the court, verdict and judgment were entered for plaintiffs. Defendant brings the case into this Court by writ of error.

The facts are all agreed upon, and are as follows:

[1] This head-note should have appeared in the report of *Humphrey v. Auditor General*, 70 Mich. 292.

[2] See note to *Ball v. Busch*, 64 Mich. 337, for a summary of the tax legislation of 1882 and subsequent years, and the rulings of the Court thereon.

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The plaintiffs now hold the original title to the land in question in this case by virtue of patents procured by their grantors. The defendant holds tax deeds covering the land in question for the taxes of 1882 and 1883, for taxes duly assessed thereon under the provisions of the tax law of 1882, and which said lands were sold under the provisions of the tax law of 1885,—all of which proceedings, assessing the tax and levying the same, and the sale of the property under such assessment and levy, were in accordance with the provisions, as to the assessment and levy of the tax, of the tax law of 1882, and as to the sale of the same in accordance with the provisions of the tax law of 1885, and in due form, as directed by such statutes.

The defendant has tax deeds duly executed by the Auditor General of the State of Michigan, based upon such assessment, levy, and sales for taxes of the land in question, under the statutes above mentioned. Plaintiffs claim title and right to the possession of said land by virtue of the original patents from the United States, and defendant claims the same through the tax deeds from the State, as above mentioned. Neither party is in actual possession. The record then states the following:

"It is the intention of the parties to this cause, so far as this case is concerned, to concede the regularity of the proceedings under the tax law of 1882 for the assessing and levying of the tax in question; but it is claimed by counsel for plaintiffs that, though the assessment and levy of the tax was in accordance with the law of 1882, and the sale was made under the tax law of 1885, it was void."

Upon the introduction of evidence, as above stated, defendant's counsel requested the court to charge the jury to return a verdict for the defendant, which request was refused, and upon such refusal the defendant assigns error.

The court charged the jury as follows:

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"The plaintiffs in this case are the owners in fee of the land described in the declaration by patent from the general government. They failed to pay their taxes for the years 1882 and 1883. Their lands were returned delinquent, and sold for non-payment of taxes under the laws of 1883, and were bid in by the defendant, and a deed issued by the State to the defendant for the taxes of those two years.

"The law of 1885 repealed the law of 1882, and the law of 1885 provided that sales for delinquent taxes for the previous years should be made under the law of 1885. The law of 1885, which provides for the sale for taxes of previous years, has been declared by the Supreme Court of this State unconstitutional and void.

"The Legislature have, during the present session, passed a law, and given it immediate effect, declaring sales under the law of 1885 for those previous years valid. This in my judgment is clearly beyond the power of the Legislature. The sale was absolutely void, and it is not in the power of the Legislature to declare a title to real estate valid which was, under the law when made, void. You will therefore find a verdict for the plaintiffs."

The questions involved in this case were fully settled in *Humphrey v. Auditor General*, 70 Mich. 292 (38 N. W. Rep. 214), in an opinion by Chief Justice SHERWOOD, in which it was held that—

"Neither the law of 1882 nor the law of 1885 enabled the defendants to collect the taxes assessed."

It was also said in the case above cited that this Court has never held that the provisions of the law of 1882 providing for the assessment of lands in this State were unconstitutional, but, on the contrary, they have always treated those provisions as constitutional; and citing *Thomas v. Collins*, 58 Mich. 64 (24 N. W. Rep. 553); *Nester v. Busch*, 64 Id. 657 (31 N. W. Rep. 572); *Goodman v. Nester*, Id. 662 (31 N. W. Rep. 575).

And in *Davenport v. Auditor General*, 70 Id. 192 (38 N. W. Rep. 211), it was said:

"We must hold that portion of the law of 1882 pro-

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viding for the assessment of property, and review of the same, constitutional."

In the present case the assessments were made under the law of 1882, and the sale made under the law of 1885. The sale so made was absolutely void. The law of 1885 was prospective in its operation only, and no legal sale could be made thereunder for the taxes in question.

Some claim is made in the brief of defendant's counsel, though not very strenuously urged, that the sale was validated by the act of 1887. Act No. 17, Laws of 1887.

In *Humphrey v. Auditor General*, 70 Mich. 292, a bill was filed in September, 1886, for the purpose of restraining the county treasurer and Auditor General from selling lands delinquent for the taxes of 1884. Counsel for defendant in that case claimed that the statute of 1887, passed after that suit was commenced, allowed the collection of taxes in question to be made under the act of 1885. This Court held that the collection could not be enforced until the act of 1887 took effect; that all proceedings taken for that purpose were illegal; and that they must be taken *de novo*, if collection was to be enforced.

In the present case the sales were made in October, 1885, and the redemption expired September 30, 1886, before the passage of the act of 1887. That is, it is claimed that assessments made in 1882 and 1883, under the law of 1882, and sales made under the law of 1885, which was prospective in its operation only, could be validated by an act of the Legislature passed subsequent to the time of the sale; and, though the sale might be absolutely void, yet by subsequent legislation could be made legal.

The Legislature possess no such power. It is true that

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a retrospective statute, curing defects in legal proceedings where they are in their nature irregularities only, and do not extend to matters of jurisdiction, is not void on constitutional grounds, unless expressly forbidden; but the proposition that the Legislature can make good that which was void when done, is utterly at variance with the fundamental principles of the law. When such a statute undertakes to take away vested rights to make good a conveyance which the grantor totally lacks the power to make, it is impossible to sustain it. *Shonk v. Brown*, 61 Penn. St. 327.

The circuit court was right in its rulings, and properly directed a verdict for the plaintiffs. The judgment of the court below is affirmed, with costs.

The other Justices concurred.

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THE TOLEDO, SAGINAW & MACKINAW RAILROAD COMPANY v. THE EAST SAGINAW & ST. CLAIR RAILROAD COMPANY AND THE FLINT & PERE MARQUETTE RAILROAD COMPANY.

Railroad companies—Condemnation proceedings—Right of crossing another road—Petition—Map of proposed route—Determination of State crossing board.

1. The *power* to appoint commissioners in railroad condemnation proceedings is conferred by How. Stat. § 3332 (as amended by Act No. 7, Laws of 1887); but the right to *exercise* it depends upon the existence of certain facts, which must be made to appear by petition to the court empowered to make the appointment.
2. An averment in such a petition that it is necessary for public

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use to take, for the use of the petitioner's road, the property and rights described in the petition, to the extent and for the purposes therein stated, is sufficient.

3. Whether the property in question in this case was necessary to accommodate the spur tracks mentioned, and whether the taking was necessary to develop business along the line of petitioner's road, were questions to be determined by the board of directors, and the petition sufficiently alleges that this has been done, and gives the conclusions of said directors.

4. Whether or not the necessity and public use required the taking of the property were questions for the commissioners to determine, and they determined that they did after viewing the premises and hearing the testimony, and in such case their determination of these questions will be held final.

5. It was unnecessary for it to appear that more was done in the construction of the road than is stated in the petition, before appointing commissioners; and if more is stated than the statute requires, it will be no reason for refusing the appointment, if the statutory requisites appear, and are substantiated before the court making the appointment. The petition in this case states that the map of the road sought to be constructed, showing the property asked to be condemned, was made and filed in the proper county.

6. Upon the map filed by the petitioner, its road at East Saginaw appears, with the terminal branches for which condemnation is now sought. They were a part of the proposed road, designated and surveyed with the main line at the same time, and there is no reason why for the purposes of the map they should not be considered a part thereof. As such, they received the certified approval of the board of directors, which should be held sufficient to give the State board of railroad crossings jurisdiction to act, and to make the proper order in the premises.

7. It was not necessary that it should be found essential to the development of business along the line of the road that spur tracks or branches should be constructed by any other board or tribunal than a majority of the directors, before the State crossing board might act, and this determination is stated in the petition.

8. The discontinuance of the proceedings as to the King-street track could not affect the action to be taken as to the other branches.

9. The purpose for which the rights are sought to be condemned in this case is held to be a public use.

10. Before a railroad company can construct its road it must make

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a survey of the route and line it desires for that purpose, and a map thereof, and file the same in the office of the register of deeds as required by statute, and it may then secure the right of way over the surveyed line by private purchase of the owners, and, if unable to do so, may institute condemnation proceedings for that purpose.

11. The map and survey adopted by the board of directors is intended to and must designate the line of road by which the place of termination is to be reached, and the line or lines upon which it is proposed to enter such place, and the ground to be occupied for its terminal facilities for the transaction of its business; and the property and franchises of another railroad company, or of any company, like the property of an individual, when condemnation is sought, is subject to the same proceedings, except that the franchises of the former cannot be seriously impaired, or to the extent of depriving it of the same.

12. The line or lines which the board of directors may adopt for the road on entering a city or village at the terminal points, when made a part of the original survey and designated upon the map, become a part of the main line of the road; and when the map and survey have received the approval of the State crossing board the rights of any other road may be condemned for its crossings, to the extent above stated.

13. The case of the construction of a branch or spur, or an extension not included in or with the main line, as a part thereof, after the map and survey have been adopted and approved by the State crossing board, or after the railroad has been completed, is not presented on this record.[1]

Appeal from confirmation of the report of commissioners in condemnation proceedings. (Gage, J.) Argued June 7, 1888. Proceedings affirmed November 1, 1888. The facts are stated in the opinion.

Edget, Brooks & Conway (*Benton Hanchett*, of counsel), for petitioner.

William L. Webber, for Flint & Pere Marquette R. R. Co.

Wisner & Draper, for East Saginaw & St. Clair R. R. Co.

[1] Head-notes prepared by SHERWOOD, C. J.

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[The points of counsel are fully stated in the opinion. —REPORTER.]

SHERWOOD, C. J. The petitioner in this case is a railroad company, organized and incorporated under the general law of this State, approved May 1, 1873.

By the articles of association the company is authorized to construct and maintain its road from Durand, in the county of Shiawassee, through Saginaw, to Mackinaw City, in the county of Cheboygan; and it is averred in the petition that it is the *bona fide* intention of the company to construct the entire road between the places named, including all branch lines and spur tracks connected therewith in East Saginaw; that, for the purposes of construction, it has divided the distance between said places in two sections. The first, and the first intended to be constructed, extends from Durand to the Saginaw river, in the city of East Saginaw.

The petitioner further avers that the company has surveyed the route of its proposed line of road from the south line of Saginaw county to the Saginaw river, in the city of East Saginaw, and has made a map and survey thereof, by which the route of said railroad, and of the several branches and spur tracks thereof in the city of East Saginaw, is designated; and that it has adopted said map and survey, and located its road, with branches and spur tracks, according thereto.

That the northward track thus located crosses the East Saginaw & St. Clair Railroad, near Maple street, in East Saginaw, and runs thence to the intersection of Brewster and Franklin streets, and thence along Franklin and Thompson streets to the Saginaw river, and is designated on the map as the petitioner's main line.

That the more southerly branch of said road, by a

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curve of 4 degrees and 62 minutes, crosses Maple street, south of Euclid street, in said city; and from thence runs westerly, across Washington avenue, near Sidney street, where said proposed line of road again branches,—one track going in a south-westerly direction, crossing Sidney, Curtis, Newton, Webber, Sherman, and Mackinaw streets, at its intersection with Linton; thence across Eaton street to a point in King street, crossing the East Saginaw & St. Clair Railroad at the intersection of Saginaw and King streets; and thence along King street to its southerly terminus of the same, crossing the several spurs of King-street track of the East Saginaw & St. Clair Railroad, which leads therefrom to the mills and manufactories situate on the westerly side thereof,—and is designated as the "King-street Branch" of petitioner's road.

That a second track from the point of divergence, near Washington avenue and Sidney street, runs on a curve to the north-west, crosses the track of the East Saginaw & St. Clair Railroad near the end of the Emerson bayou, and runs to the westerly bank of the same, and from thence north-easterly along said bayou, to the terminus on the "Middle Ground," so called, situated between the Saginaw river and Emerson bayou; this track being designated as the "Middle-ground Branch" of petitioner's road.

That the company has decided that, in order to develop the business along the line of its road, it is expedient to build and finish the branch lines above described at the same time and as a part of the main line. And it further avers that the building of the branches is necessary to obtain a location upon the river front on Saginaw river, and to accommodate the business and shipping interests of the city on said river.

That the map and survey show the particular crossings

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to be made as selected, and of the tracks of other roads, with petitioner's main, branch, and spur tracks, and that such map has been approved by the State board, after notice to parties interested, and a full hearing of the matter before them, including the branches and spur tracks; and such approval is indorsed on the same, and has been filed, with the proper certificate of the directors indorsed thereon, that the company has located the road according to said map and survey, with the register of deeds of Saginaw county.

The petitioner further shows that the State crossing board has determined the grade for said crossings of petitioner's road, branches, and spurs, and has designated the switches and kind of frogs to be used at such crossings, and in what manner the expense is to be borne in making and maintaining such crossings; and has determined the stop of trains to be made before making a crossing of the road when completed, and what precautions shall be taken, and at whose expense be maintained, to prevent accidents at such crossings.

The petitioner further alleges that it has obtained the consent of the common council of East Saginaw to lay its track in King street.

Petitioner further shows that it desires to cross with its road and branches and spur tracks the defendants' roads and spurs, and to acquire the right to do so; and petitioner further alleges—

"That it is necessary, for the purpose of constructing, building, and operating the King-street branch of its said railroad, to cross at grade, and at an angle of 14 deg. to the center line thereof, the main tracks of the said East Saginaw & St. Clair Railroad, at the intersection of King and Saginaw streets, and also to cross, at such angle, to the center line thereof as their bearing course shall require, the several spur tracks leading westwardly on King street from said main track, at the place and in the manner specified in the said order of the State board

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hereinbefore recited,—all substantially as shown in the map hereto annexed, and made part of this petition; and, to that end, to acquire the right and privilege to make use of that part of said King street occupied by the tracks of the East Saginaw & St. Clair Railroad, for the purpose of constructing and operating your petitioner's said railroad across the main and spur tracks and right of way of said East Saginaw & St. Clair Railroad, in said street, at the point designated in your petitioner's said map as the points of intersection or crossing said main and spur tracks; also the right to cut the rail of the said main track and spurs at the several points of intersection of your petitioner's proposed road therewith, and to insert therein suitable crossing frogs at the grade thereof, and to erect and maintain the safety gates at the several spur crossings, in the manner required by the said order of the State board; together with the right to pass and repass your petitioner's trains of cars on and over said main track and spurs.

"And your petitioner avers that the taking of said right, privileges, easement, and property in and over said East Saginaw & St. Clair Railroad, and its said spur tracks, to the extent, in the manner, and for the purpose so stated, is necessary for the public use.

"Your petitioner further shows that it desires to acquire the right to cross, with the Middle-ground branch of its said railroad, the said East Saginaw & St. Clair Railroad, at grade, at the point and angle designated for such crossing in said map hereto attached, and made part of this petition."

Petitioner then gives a particular description of the lands required for the right of way and crossing, and the particular interests it seeks to obtain therein for such use; and petitioner expressly avers that the taking of said land, and the privileges asked for therein, is necessary for public use, and to the extent stated; that the East Saginaw & St. Clair Railroad Company has its offices in East Saginaw, and is the owner of the East Saginaw & St. Clair Railroad; that the Flint & Pere Marquette Railroad Company is in possession of and operating said East Saginaw & St. Clair Railroad Company, and is the lessee thereof.

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That petitioner has been unable to agree with the owner of and parties interested in said premises, for the premises and rights it desires, and to cross the track and acquire the right of way over defendant's railroad in King street, or any of the several spurs diverging from the King-street track, in manner and form as set out in the petition, or to acquire title thereto, or to the right of use in said premises described, for the purpose of crossing with its said Middle-ground Branch Railroad, because said defendants deny all legal right on the part of petitioner to take said premises for the purpose stated, and refuse to negotiate on any basis whatever. Petitioner prays for the appointment of commissioners to condemn the land; to determine the necessity for taking for public use for the Middle-ground branch of petitioner's road; also the necessity for taking for public use the rights of crossing, with petitioner's King-street branch of its railroad, the main track of the East Saginaw & St. Clair Railroad, located in King street, and its several spur tracks, diverging westerly therefrom, together with the other rights and privileges incidental to such crossing; and to appraise and determine the damage and compensation to be allowed therefor to the owner thereof and the operating mortgagee.

The respondents appeared, each by his own attorneys, and made their joint answer to the petition, and give, among other reasons why the prayer of said petition should be denied, the following:

"1. There has been no map filed in the office of the register of deeds of Saginaw county showing the line of the road of said petitioner, and certified to by a majority of the directors of said company, over, across, or along the property sought to be acquired by said petition.

"2. There has been no order made by the railroad crossing board, mentioned in said petition, in any case where said board had jurisdiction; and the order to which

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said petition refers, so far as it relates to the property sought to be condemned in this proceeding, is utterly without force, and void, as having been made without any jurisdiction whatever.

"3. And the said East Saginaw & St. Clair Railroad Company avers that no notice was given to it by the said railroad crossing board, nor was any hearing had at which it was represented, concerning the approval of the map referred to in said petition.

"4. It is not pretended that any part of the property sought to be taken by this proceeding is necessary for the construction of the petitioner's said railroad, the said track being alleged to be a spur or branch; and these respondents deny that there is any power or right, under the general railroad law, to take property and rights by condemnation for private purposes, and aver that the purposes sought to be served by the taking of the rights specified is a private purpose.

"5. And these respondents deny that the city of East Saginaw had any authority to grant to the petitioner any rights whatever upon King street; and aver that these respondents are in possession of said King street under the rights heretofore granted by the proper municipal authorities of the territory where the said street is situated, and has constructed its spurs and branches, and is using the same now as a part of the main line of the said East Saginaw & St. Clair Railroad, and that the use by the said East Saginaw & St. Clair Railroad is necessary for a public use, and that the territory sought to be taken by the said petitioner is territory which is now occupied by these respondents for a public purpose and public use, and deny the right of the petitioner to take property already subjected to a public use for its use.

"6. These respondents deny that the petitioner has any right to proceed to condemn property or to build spurs or branches for the development of business, prior to the construction of the main line.

"7. These respondents expressly aver that the order made by the said railroad crossing board, referred to in said petition, was utterly without jurisdiction, and that in assuming to exercise powers legally conferred upon it the said board exceeded its jurisdiction; and that the order made by said board in the premises is absolutely null and void, for the reasons in that behalf hereinbefore given.

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"8. That the statute which authorizes the making of a map and survey of a line of road refers to a single line, and does not contemplate a system of branches and spurs radiating in various directions from said main line; and, as the rights and property sought to be acquired by this petition are not upon any part of the line or route of the road of said petitioner, the statute confers no authority to proceed before commissioners or a jury for condemnation.

"9. The map upon which said board of railroad crossings assumed to act was a map which was approved only by the directors as a map of the main line of road, and nothing upon said map indicated an approval by the directors of any spurs or branches.

"10. That the use which the petitioner seeks to make of the spur tracks and branches alluded to is a mere private use, for freight tracks only; that the petitioner has no expectation of using the same for passenger trains, but designs to treat them as yard-tracks, for the private purpose of receiving freight for transportation from private parties at less expense than to do so in the ordinary way of drayage.

"11. That the statute nowhere gives the petitioner the right to take the property and the right of way of these respondents, except for the purpose of crossing with its main line of road, and no such crossing is sought by this petition.

"12. That the statute nowhere gives the petitioner the right to take the facilities and franchises which belong to the respondents upon King street, and convert them to its own use.

"13. That the said petition is untrue, and insufficient in its allegations to entitle the petitioner to any order for the appointment of commissioners, and these respondents pray that the same may be dismissed.

"14. Respondents further state that the said petition does not properly describe the property and rights and franchises sought to be taken at the proposed crossing by its King-street branch of the said East Saginaw & St. Clair Railroad, nor at the proposed crossings of the seven branch or spur tracks extending from said East Saginaw & St. Clair Railroad, in King street; nor does it properly describe the property, rights, and franchises sought to be taken at the crossing by what is termed in the petition

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'Middle-ground Branch,'—all said description being indefinite, uncertain, and insufficient.

"15. Respondents further state that the said petition is not in its allegations in conformity with the statute in such case made and provided.

"16. It is not competent in law to petition for more than one crossing, in one application, and this petition embraces nine crossings."

These several reasons were preceded by a denial of the truth of the averments of the petition.

Testimony was taken before the court upon the hearing of complainant's petition, in which it appears that the defendants had notice of the hearing before the State railroad crossing board, in the matter of the approval of the map; that their representatives attended the meeting, and took part in the same, and raised no question as to want of sufficient and proper notice at that time. The evidence also tended to show that the rights of way for the petitioner's road had mostly been obtained from East Saginaw, south, to within two and one-half miles of Durand, its southern terminus; that a contract for the construction of the entire line of road, including all branch lines and spur tracks, had been let, including the building of bridges, docks, terminal points, and depots, and everything required to fit the road for operation; that 12 miles of the roadway was ready for the ties, and the said Middle-ground branch had been partly graded, down to the East Saginaw & St. Clair Railroad track and crossing.

The testimony tends to show, further, that the "Middle Ground," so called, lies between Emerson's bayou and the Saginaw river, and is capable of being made navigable for vessels of all classes, and it is the design to construct upon this place docks, slips, and store-houses requisite for a water terminus; that the main line is largely to be furnished with its freight from this branch;

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that the traffic will be of a bulky nature, such as coal, stone, and wheat, coming to the main line, and going out on the main line will be lumber, lath, salt, shingles, and timber and other forest products, and the main line will be greatly dependent at all times for its freight upon these branches and spur lines for its business, and that all these bulky articles must go to the river front, and not to a central warehouse, to make the business of any profit or successful, and there is no other location so eligible as this "Middle Ground" for the purpose mentioned.

That by the action of the defendants, in refusing to allow the crossing of the tracks, the contract for the completion will be greatly delayed, as the completion of the branches is of great assistance in bringing in material for the construction of the main line, the delay of which is a great damage to the public.

That 96 per cent. of the salt product of the Saginaw river, amounting to 18,000,000 barrels per year, is handled by the Michigan Salt Association, and that, of the 750,000,000 feet of lumber manufactured at the Saginaw mills, 250,000,000 feet, in 1887, were shipped by rail, and that it is believed that, in 1888, 300,000,000 feet will be so shipped, and that it is impossible to dray to central stations such quantities for the purpose of shipment; that it can only be done by the use of spur lines to manufactories where the articles are produced; that the tonnage of the salt and lumber alone in the Saginaw valley exceeds the entire tonnage of the wheat crop of the two states of Wisconsin and Minnesota combined, and that a very great public interest will be subserved by the increase of transportation to be furnished by the construction of petitioner's road, with its branches and spurs; that, in addition to the interest generally subserved by the proposed Middle-ground terminal, it is necessary to

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accommodate the mills and salt manufactories and lumber-yards and the furniture companies, in removing their products.

The circuit judge, upon such hearing, overruled all objections made by respondents, so far as they relate to the Middle-ground branch of petitioner's railroad, and appointed commissioners to ascertain and determine the necessity for taking for the public use the real estate, rights, and easements necessary for operating said branch, and to determine the compensation and damages of respondents which petitioner should pay therefor; and the court further denied the application relating to the King-street branch, whereby it sought to enforce a crossing of the respondent's road at King street where it intersects Saginaw street, and to cross the seven spur tracks of respondents' road, leading westerly in King street from the main track.

The order entered by Judge Gage in the matter reads as follows:

"The court finds that no sufficient cause has been shown against the granting of the prayer of the petition, so far as relates to the appointment of commissioners to ascertain and determine the necessity for taking the property, rights, and easements alleged in the petition to be necessary for the building and operating of petitioner's railroad, described and designated in the petition as the 'Middle-ground Branch,' in manner and form therein recited; and it is therefore ordered that all objections raised by respondents to said petition, so far as the same relate to said 'Middle-ground Branch' of petitioner's proposed railroad, be, and the same are hereby, overruled. And, respondents not demanding a jury, it is further ordered that Charles W. Grant, D. F. Rose, and D. A. Pettibone, three disinterested and competent freeholders of Saginaw county, be, and they are hereby, appointed commissioners, agreeable to the prayer of said petition, to ascertain and determine the necessity for taking for the public use the said real estate, rights, and easements alleged by petitioner to be necessary for the building and operating of the said 'Middle-ground Branch' of its railroad; and, in the event they determine that it is necessary to so take the same, to appraise and determine the compensation and damages to be allowed and paid therefor by petitioner to respond-

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ents,—all in manner and form as more fully set out in said petition, and reference to which is for greater certainty hereby made. And such commissioners are directed to first meet at the court-house, in the city of Saginaw, on the sixth day of January, A. D. 1888, at 9 o'clock A. M., then and there to enter upon their duties under this appointment.

"The court further finds and determines that the application of the petitioner to acquire the right to cross with its 'King-street Branch' railroad the main track of the East Saginaw & St. Clair Railroad at the intersection of King and Saginaw streets, and also to cross the several spur tracks, seven in number, leading westwardly in King street from the main track of said respondent company's railroad, in manner and form prayed by its petition, is to be regarded and treated as an entire and indivisible proceeding.

"That, under the proofs in the case, so much of King street, so called, as lies south of the Ann Arbor Salt & Lumber Company's plat, and north of the north line of the Derby addition to the city of East Saginaw, and within the limits of which five of the spur tracks of respondents' railroad sought to be crossed by petitioner are situate, has not been at any time lawfully laid out, and is not now a lawful public street in which the common council of the city of East Saginaw could grant petitioner right of way, but it is in part the private property of the respondent company; and that as a result of this finding it is ordered that the said application of the petitioners in this cause, so far as it relates to the "King-street Branch" of its proposed railroad, in manner and form as now presented by the petition, be, and the same is hereby, denied.

"But this finding and order is not intended and shall not be construed as passing upon or determining against the rights of petitioner to obtain the crossing of said respondents' main track at the intersection of King and Saginaw streets, or the two spur tracks next south of such intersection which lead westwardly from said main track, in that portion of King street north of the south line of the said Ann Arbor Salt & Lumber Company's addition, nor to determine any right of either petitioner or respondents in said portion of King street last specified, nor in anywise to preclude the petitioner from at any time hereafter proceeding by petition in proper form to acquire such right in said street as it may lawfully be entitled to acquire therein."

Commissioners were duly appointed in pursuance of the order made in the matter relating to the Middle-ground branch, and on the hearing before them all the parties were represented, and testimony was taken upon both sides. But one witness, however, on each side was sworn.

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The commissioners viewed the premises, and, after hearing the testimony, determined—

"That it is necessary to take for the public use, * * * to wit, at the head of 'Emerson Bayou,' so called, in the city of East Saginaw,"—

The property, rights, and premises mentioned in the petition, sought to be condemned for the use of respondents' road; and assessed respondents' damages at the sum of $150, which they awarded to respondents jointly.

To the confirmation of this report of the commissioners the respondents appeared by their counsel, and made the following objections:

"1. There is no law authorizing the taking of the property and crossing of defendants' road for the purpose set forth, and as prayed for in said petition.

"2. The appointment of said commissioners was against respondents' rights, and was without authority of law.

"3. Under the evidence before the court, and the law of the land, the court had no authority to appoint said commissioners, and no right to act in the premises was conferred upon said commissioners by the order appointing them.

"4. The evidence taken before the court upon the hearing of the petition for the appointment of commissioners did not show that the taking of respondents' property was necessary for public use, but, on the contrary, the evidence affirmatively showed that such necessity did not exist.

"5. The court having determined that, as to so much of said petition as referred to King street, the prayer for the appointment of commissioners must be denied, and having so ordered, there was no authority for the appointment of commissioners upon what is called in the said petition the 'Bayou Branch,' and the court erred in appointing such commissioners, and they were without authority to act.

"6. The evidence taken before said commissioners did not show that the taking of the property in question was necessary for the public use, but, on the contrary, showed that no necessity existed.

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"7. The evidence before the commissioners showed that no part of the line of petitioner's railroad was in operation or constructed, and no ties or iron had yet been laid upon any part of it.

"WM. L. WEBBER, Attorney for F. & P. M. R. R. Co.

"WISNER & DRAPER, Attorneys for E. S. &. St. C. R. R. Co."

The report of the commissioners was duly confirmed by the circuit judge.

Respondents have taken their—

"Appeal from the appraisal and report of the commissioners in this matter, and from the proceedings in said matter, and confirmation of the report of said commissioners, and specify the following objections as grounds and reasons for appeal:

"1. That the circuit court has no power or jurisdiction to appoint the commissioners in this matter.

"2. That, under the evidence taken upon the hearing for the appointment of commissioners, the court was not authorized to make such appointment, and the order appointing the same was erroneous, and against the rights of respondents.

"3. That the circuit court was not authorized to appoint said commissioners, and erred in so doing; because it affirmatively appeared, upon the hearing of the petition for their appointment, that the taking of respondents' property for crossing purposes was not necessary for the public use, and because it affirmatively appeared that the building of the spur track in question, and the taking of respondents' property for crossing purposes, had not been found necessary to develop business along the petitioner's line of road, and that no part of petitioner's railroad was in operation, nor had any ties or rails been laid upon any part of the same.

"4. That the circuit court erred in appointing said commissioners, and that the order appointing the same was unauthorized, because—

"*a*—There had been no order made by said railroad crossing board, at any time, in this matter, where said board had jurisdiction.

"*b*—The purpose of taking the rights sought to be taken by the petition was a private, not a public, purpose.

"*c*—That petitioner had no right to condemn property to build

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spurs or branches, for the development of business, before it had any part of a main line constructed.

"*d*—The order alleged in said petition to have been made by the railroad crossing board was made before it had been found necessary, to develop business along petitioner's line of road, that any spur track or branch should be constructed, and before the board of directors of petitioner had judged or determined that there existed such necessity, or that it was expedient to build any spur or branch.

"5. The court having determined and ordered that the prayer of said petitioner, in so far as it related to the King-street branch, must be denied, there was no authority for the appointment of commissioners upon what is called in said petition the 'Middle-ground Branch.' The court erred in appointing said commissioners, and they were without authority to act.

"6. The evidence taken before said commissioners did not show that the taking of the property in question was necessary for the public use, but, on the contrary, showed that no such necessity existed, and the finding of said commissioners in that behalf was arbitrary and unjustifiable, and against the rights of respondents.

"7. The evidence taken before the commissioners showed that no part of the line of petitioner's railroad had been yet constructed, and no ties nor iron had yet been laid upon any part of it.

"8. That the court erred in confirming the report of said commissioners against the objections of respondents.

"*Dated January* 29, 1888.

"W. L. WEBBER,

"Attorney for Flint & Pere Marquette Railroad Company.

"WISNER & DRAPER,

"Attorneys for East Saginaw & St. Clair Railroad Company."

We will now proceed to consider the grounds of objection in the order stated, as they include, substantially, all the objections made from the beginning of the proceedings.

The first relates to the power and jurisdiction to appoint commissioners in this case. The power to appoint commissioners in such cases is conferred upon the court by statute (How. Stat. § 3332); but the jurisdiction or right to exercise that power depends upon the existence of cer-

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tain facts, which must be made to appear by petition to the court empowered to make the appointment.

It is claimed the petition in this case is defective; and the particulars in which it is claimed by respondents to be insufficient are specifically pointed out in the next four grounds of objection above set forth.

The petitioner states that it is necessary for public use to take, for the use of petitioner's road, the property and rights described in the petition, to the extent and for the purposes therein stated. This is a sufficient averment upon that subject for the petition to contain. Whether the property in question was necessary to accommodate the spur tracks mentioned, and whether the taking was necessary to develop business along the line of petitioner's road, were questions to be judged of by the board of directors, and the petition sufficiently alleges that this has been done, and gives their conclusions. Whether or not the public use required the taking of the property was a question for the commissioners to determine. They viewed the premises, and heard the testimony upon the subject, and they determined the taking was for public use.

It was unnecessary for it to appear that more was done in the construction of the road than is stated in the petition, before appointing commissioners. How. Stat. § 3332. If more is stated in the petition than the statute requires, it will be no reason for refusing the appointment, if the statutory requisites appear, and are substantiated before the court making the appointment. The petition states that the map of the road sought to be constructed, showing the property asked to be condemned, was made and filed.

It is quite clear that the action of the State crossing board, approving the map, should precede any attempt to condemn the crossing; and respondents claim that in

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this case there was no authority in the board to approve the map made; that it was not certified by a majority of the directors.

The Toledo, Saginaw & Mackinaw Railroad Company was organized in the fall of 1887, and on October 13 filed its map, upon which, at East Saginaw, its road appears, with the terminal branches for which condemnation is now sought. They were a part of the petitioner's proposed road, designated and surveyed with the main line at the same time, and there is no reason why for the purposes of the map they should not be considered a part thereof. As such, they received the certified approval of the board of directors; and we think that should be held sufficient to give the State board jurisdiction to act, and to make the proper order in the premises. It was not necessary that it should be found essential to the development of business along the line of the road that spur tracks or branches should be constructed by any other board or tribunal than that of a majority of the directors, before the State crossing board might act. It was only necessary for it to appear that the majority of the directors had adjudged or determined that it was necessary, expedient, and proper to build such spurs and branches before the State crossing board took their action to make this proceeding proper, and this is expressly stated in the petition.

We see no objection to the petitioner discontinuing its proceedings as to the King-street branch. It could not affect the action to be taken as to the other branches.

The main question to be considered, however, and which we regard as the important one in these proceedings, is raised in the sixth and seventh objections made by respondents' counsel, and in the second clause of the fourth objection:

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1. That the purpose for which the rights are sought to be condemned is a private, and not a public, one.
2. That the evidence before the commissioners did not show that the taking of the property in question was necessary for public use, but, on the contrary, showed that no such necessity existed.
3. That it does not appear that any part of the line of the petitioner's railroad has yet been constructed.

Upon the last point we have said all that we desire to. The statute requires that the articles of association of a railroad company must contain the name of,—

"The places from and to which, and the name of each county into or through which, it is or is intended to be constructed." How. Stat. § 3313.

The right to construct the road between the places named is thus conferred upon the company when it is legally and properly organized; but before the company can construct its road it must make a survey of the route it desires for that purpose, and make a map of the same, and file it in the office of the register of deeds. It may then secure the right of way over its surveyed line by private negotiation with the owners thereof, or, if unable to do so, it may take condemnation proceedings for the purpose; and, before the right of way can be acquired in such case, both the necessity for taking and just compensation for the property must be ascertained by commissioners or a jury, as the owner may choose.

The map and survey adopted by the board of directors is intended to and must designate the line of the road by which the place of termination is reached, and the line or lines upon which it is proposed to enter such place, with the grounds to be occupied for its terminal facilities for the transaction of its business, and both should be selected with a view to the business of the road, and the convenience of the same, and the necessities of the public; and

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the property and franchises of a railroad company, or of any other company, like the property of an individual, when condemnation is to be had, must be subject to such necessity, except that, in the case of a railroad, its franchises cannot be seriously impaired, or to the extent of depriving it of the same.

The line or lines the board of directors may adopt for its road on entering a city or village, in reaching the terminal points, when made a part of the original survey and map, constitute and become a part and parcel of its main line; and when the map and survey shall have received the approval of the State crossing board, and been filed with the register of deeds of the county in which the crossings are to be made, the rights of way of other roads may be condemned for the use of the crossing road, as in the case of private property, and it will make no difference whether the new road proceeds through the place to the terminal points by one or more terminal lines. The construction of a branch or spur, or an extension not included in or with the main line, and as a part thereof, after the map and survey have been adopted and approved by the State crossing board, or after the railroad has been completed, presents another and entirely different question. It then becomes an added section of the road. The circumstances may or may not be the same as when the main line was constructed. The convenience and necessity in the one case may be far different from those in the other; but that question is not now before us, and it is unnecessary to discuss it further. The same power and authority existed in the company to condemn the respondents' right of way for its spurs or branches as for the main line, and it was not necessary that any portion of its line should have been completed, for the company to do this.

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The company is also given power by the statute to condemn the right of way across the respondents' track, if necessary to obtain it. How. Stat. § 3323; Laws of 1887, p. 294.

It is true that a railroad company cannot be organized under the general statute, or by special enactment, with the power to condemn a right of way for a strictly private use. Such a statute would come within the prohibition of the Constitution; and, while all railroads not constructed by the State or general government are more or less for private gain, still it is nevertheless true that the construction of no such railroad can be authorized by the Legislature under the Constitution unless some public interest or necessity is subserved thereby, and the approval of the crossing board of such a scheme would be of no avail.

The object in constructing petitioner's road is for the transportation of freight and passengers. A large and profitable portion of the freighting business, it appears from the record, cannot be reached in the ordinary way of moving the same, except by the extension of its road to the points designated by the board of directors, and that the road cannot be operated unless it can secure the business of moving such freight; that for this purpose the construction of the branches designated is necessary. If this is true, it is difficult to see why the construction of the branches should not be regarded for public use, as well as the construction of the main line, which is not controverted. It would appear that the object of the petitioner is to acquire important facilities for the transaction of the legitimate traffic and business of its road now being constructed, when completed.

It is evident that while the business to be reached by the use of the branches may enhance the profit of some individuals, and is largely for the gain of the company,

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it is equally certain that the use of the road for that purpose is of a public nature, and, like all the other business of the road, it is necessary to be reached in order to enable the company to operate its line of road. Indeed, the record shows that the construction of the branches and spur tracks laid down upon the map is essential to any successful operation of petitioner's road, and must be held for the public use. This is not the case of a company seeking the condemnation of property to reach some private business, not essential to the successful operation of its road, and for private use, as claimed by counsel for respondents. The public character and use of the branches are as well established as are those of any portion of petitioner's road.

We think the proceedings should be affirmed, with costs.

CHAMPLIN and LONG, JJ., concurred with SHERWOOD, C. J.

CAMPBELL, J., *(dissenting)*. I cannot agree in the conclusions of the Chief Justice in this case, or upon the action of the State crossing board, which was brought before us at the same hearing. The whole proceedings are, in my opinion, in violation of the railroad laws, and absolutely void. I propose to refer only to those matters which are fundamental. I doubt very much whether the other objections taken are not sound; but, if there was no power to authorize lands to be condemned at all, the questions of regularity do not become important.

As the opinion of the Chief Justice does not, as in his view it was not necessary he should, state the peculiarities of these applications, I will point out such of them as it is necessary, in my view, to state:

The petition states the petitioner to be a corporation authorized to make a railroad from Durand, in the

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county of Shiawassee, via Saginaw, to Mackinaw City, in the county of Cheboygan, and that it was the intention to construct and maintain it throughout—

"From and to the said places named, for that purpose, in its articles of association, including all the branch lines and spur tracks connected therewith in the city of East Saginaw."

That the work had been divided into two divisions, for purposes of construction, and that division one extended from Durand to the Saginaw river, in East Saginaw; that the railroad runs from a point named, and through towns named, to a point in the north-west quarter of section 21, near the southerly limits of East Saginaw, and "thence, by two separate tracks, to the Saginaw river." The northward track is designated on the map and petition as petitioner's main or through line of road.

It then proceeds to describe what it calls branch road, or tracks; the principal one crossing Washington avenues near Sidney street, where it again branches into two more branches, one called the "King-street Branch" and the other the "Middle-ground Branch," which latter coasts the bayou, and terminates at the middle ground in the river.

These several branches are stated in the petition to have been determined necessary to develop business along the line of the railroad, and to obtain a river front on the Saginaw river, and reach and accommodate the shipping interests. The remainder of the petition states various matters relating to the details of the work desired, and making the crossings over respondents' roads.

The King-street branch was relinquished on the hearing below. Whether this was regular is not important, in my view of the case.

We have, then, in brief, a railroad organized to run

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from Durand, through Saginaw, to Mackinaw City, with its main track reaching Saginaw river, away from any of what the petition treats. and properly treats, as branches. It further gives, as a reason for the creation of branches, the necessity of developing its business; putting its rights entirely under section 28 of article 2 of the railroad act. That section allows a company to—

"Build such spur tracks or branches as may be found necessary to develop business along its line of road, as the board of directors may judge to be expedient, and for that purpose shall have the same powers and rights in all respects as are conferred upon it for the construction of the main line, and may subscribe to the capital stock of any other company organized under this act, with the assent of such other company. * * * All companies owning or operating such spur or branch railroad, or making any such contract or agreement with connecting or intersecting lines of railroad, shall furnish cars and transport freight over such spur, branch, or connecting road, at the same rates, and subject to the same restrictions and regulations, as shall be adopted for the transportation of freight upon the main line."

By section 45, railroads having either or both of their *termini* on navigable streams, between this and other states and Canada, preventing direct railroad connection, may own or operate vessels to form such a connection.

The chief question to which I propose to refer is the legality of condemning lands or crossings for such tracks as this petition proposes to condemn, as well as the further question whether in the present case such branches could be so laid if in any case allowable.

I think it is impossible, under this petition, to regard anything described in it for condemnation as belonging to the main track. The petition itself makes no such pretense. The statute for many purposes draws a clear distinction between the main track and all others. The main track is throughout treated as a single line between

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two *termini*. And its right to form water connections is confined to those two *termini*.

Apart from the other objections, this has a bearing on the Middle-ground branch. That is proposed to have a terminus of its own on navigable water, to accommodate the shipping business. The legislative policy, as designated in both special charters and general laws, has not been to give railroad companies power at any place not a terminus to make water connections. Under the old special charters, amendments were required to authorize such connections at all at any but the original *termini*, and the general law is positive on the subject. There must have been some reason for it. It very probably may have been the purpose of the Legislature to make each road a single highway from one point to another. In other highways and turnpikes the law has been strictly construed against extending them beyond or away from the fixed bounds, and in several cases in this Court we have held the franchises could not be exercised beyond those bounds.

But when we look at the powers given to build roads, this appears more plainly. The only roadway that any railroad company is authorized to acquire by condemnation is to lay it out—

"Not exceeding one hundred feet in width." Article 2, § 9.

Lands may be had for depot grounds, and for embankments, and other adjacent purposes, necessary for the safe building of the track. Whatever road is laid must be within the line of 100 feet, or in the yards and depot grounds. There is no such thing contemplated as a series of tracks forming half a dozen *termini*. This is also in the direct line of legislation on all artificial ways. No one has supposed that power to lay out one line involves

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power to lay out any more than one. Franchises, especially such as involve condemnation of lands, cannot be enlarged beyond the grant, as fairly construed. It cannot be held, I think, that a single company, under a power to go from A. to B., can spread out in all directions, and cover different routes, long or short. If this could be done, the road first occupying the ground has under the statute some protection against rivalry in important respects, and under such a claim as this it might very easily change its whole pretended character. I cannot, therefore, agree with the Chief Justice in considering the question of condemnation for branches as out of the case. It seems to me to be the very and only fundamental question in the cause. Petitioner makes no other case.

Section 28, as already seen, authorizes branches and spur tracks to be built, and, in proper cases, to be built under the right to condemn lands. But this cannot mean that everything that a railroad chooses to call a branch is one under which lands can be appropriated. Taking this section together, it clearly indicates that these so-called "spurs" or "branches" shall be in themselves highways of transportation, over which the same rights exist in the public and in favor of other railway companies for carriage as on the main line. They are treated as roads in themselves, analogous to any other road, and just as public in their nature. They are treated in this section as connecting roads are in the hands of other companies, and there is nothing to indicate that a railroad may lay out tracks and condemn lands for any branches that are not for public use and convenience. Each branch is treated in the statute as a separate enterprise, by itself. It cannot be seriously claimed that these branches are distinct highways, or serve any such purpose; and, if not, the company cannot compel land-

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owners to submit to them, or group them in one petition, and keep them from separate consideration.

It is not true in this State, as it is in some others, that a company once organized has an absolute right to secure its road. Under our Constitution, any one can be allowed to make such an organization. But, when it comes to taking land, the necessity of the enterprise for the public utility must be determined by a jury or commissioners. This cannot be settled once for all. On every occasion of condemnation proceedings, this question is open, and may be decided against the power.

This record shows plainly enough that this doctrine was not laid before the commissioners. Their finding shows conclusively that they considered themselves as only inquiring whether the land was needed for the branches, and not for the public use, in any other sense.

This suggests another question much dwelt on at the hearing. No branch is allowed by the statute except as it is found "necessary to develop business along its line of road." This implies the existence of a road to do business. No such road existed when this land was sought to be condemned, and it is not made a condition of condemnation that any shall be built. It is easy to see that with these short lines running in every direction through East Saginaw, if they can be separately established, the whole main line, which may be of no account, may be dropped or subordinated. Proceedings set up for one purpose, as parts of one road, may be used to put in single hands the key to the local business, and to make the short tracks an end for separate profit as feeders to other roads, instead of means to help the main line. I do not think this is allowable.

No rule of corporation law is plainer than that corporations must keep within the lines and conditions of their chartered privileges. The legal powers of our railroad

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companies are very great, but they are limited to such connections as the law specifies, and their power to take lands from unwilling owners is by the Constitution confined to public, and not corporate, necessity. That principle is violated by these proceedings.

Passing by the minor irregularities, which might be rectified in these or other proceedings, I think the objections referred to are absolute and incurable. There was no power, I think, in the commissioners of crossings to permit these crossings, and no power to condemn the right of way. I think the action of all parties in the matter should be quashed.

MORSE, J., concurred with CAMPBELL, J.

THE PEOPLE, EX REL. THE FLINT & PERE MARQUETTE RAILROAD COMPANY, v. THE BOARD OF RAILROAD CROSSINGS.

Railroad companies—Condemnation proceedings.

This case is ruled by *Railroad Co. v. Railroad Co., ante,* 206.

Certiorari to the State Board of Railroad Crossings. Argued June 7, 1888. Proceedings affirmed November 1, 1888. The facts are stated in the opinion in the former case.

William L. Webber and *Wisner & Draper,* for petitioner in *certiorari.*

Edget, Brooks & Conway (*Benton Hanchett,* of counsel), for respondent in *certiorari.*

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SHERWOOD, C. J. This case is *certiorari* to the Board of Railroad Crossings, relating to proceedings had by said board in the matter of the approval of the map of the Toledo, Saginaw & Mackinaw Railroad Company's road through the county of Saginaw.

The case of *Railroad Co. v. Railroad Co., ante,* covers substantially the same questions involved in the present case, and renders a rediscussion of them unnecessary here; and we need only to say, further, that we have looked through the proceedings as they come before us upon this record, and have failed to discover any errors committed by the board, and its action in the premises will therefore be affirmed, with costs.

CHAMPLIN and LONG, JJ., concurred with SHERWOOD, C. J.

JAMES K. BURNHAM ET AL. v. WILLIAM HASKINS ET AL.

Assignment for benefit of creditors—Fraud—Preferences—Bill in equity by creditors.

1. How. Stat. § 8744, was intended to give to the creditors of an insolvent debtor ample relief against the incompetency, neglect, or fraud of the assignee.
2. A creditor may file a bill, under How. Stat. § 8744, to set aside a chattel mortgage, alleged to have been given in anticipation of an assignment by the mortgagor, and to secure to the mortgagee a preference, to which transaction the assignee is alleged to have been a party, without obtaining an order from the court requiring the assignee to institute proceedings to annul said mortgage.

Appeal from Clinton. (Smith, J.) Argued June 7, 1888. Decided November 1, 1888.

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Bill to set aside a chattel mortgage. Complainants appeal. Decree sustaining demurrer reversed, and demurrer overruled, with leave to answer. The facts are stated in the opinion.

O. L. Spaulding, for complainants.

H. E. Walbridge and *B. J. Corbin*, for defendants.

LONG, J. The bill in this cause alleges, substantially, that on November 14, 1887, one George V. Goodrich was doing business in the village of St. Johns, Clinton county, Mich., as a retail merchant of dry goods and millinery, and on that day was indebted to complainants Burnham, Stoepel & Co. in the sum of $1,144.29; C. L. Luce & Co. in the sum of $1,559.48; Foote, Reed & Co. in the sum of $390.31; Brown, Durrell & Co. in the sum of $125.75; W. H. Mitchell & Co. in the sum of $112.52; Richard Macauley & Co. in the sum of $98.20; and to other parties about the sum of $400; that he had in his store at St. Johns a stock of merchandise of the nominal value of about $4,100, but the real value of which was much less; that he had no other property, real or personal.

That on said November 14, Goodrich made a chattel mortgage to William and Eliza Haskins, to secure to them the payment of $2,230.98, as recited in said mortgage, on his entire stock of dry goods, millinery goods, and all his store fixtures and furniture, which said mortgage was filed in the office of the township clerk of the township of Bingham, in which the village of St. Johns is situated, at 11 o'clock A. M. of that day.

That at the time of the execution and delivery of said mortgage said Goodrich intended that it should operate as a preference to said William and Eliza Haskins, if they were creditors of said Goodrich, which complainants

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deny; and that he intended to make an assignment, which was well known to said William and Eliza Haskins, who received the same with fraudulent intent to gain an unjust and fraudulent preference over orators and other *bona fide* creditors of said Goodrich,—they well knowing that said Goodrich was in failing circumstances, and with him intending to cheat, hinder, and delay orators in the collection of their just debts.

"That immediately upon the making of the said chattel mortgage, and as a part of the same transaction, the said Goodrich made an assignment of all his property, subject to his exemptions allowed by law, for the benefit of all his creditors, naming therein, as assignee, Henry E. Walbridge, an attorney at law, who drafted both the said chattel mortgage and assignment, and who, as your orators are informed and believe, was the adviser of said Goodrich and the said William and Eliza Haskins in the matter of said assignment and chattel mortgage; and that thereupon the said Walbridge accepted said trust, and, filing the bond required by statute, took possession of the assigned property, and is now actively engaged in selling the same.

"That, as your orators are informed and believe, the actual value of the property is less than $3,000, and worth little, if anything, above the amount of said mortgage, and the expense of executing the assignment; that the indebtedness of said Goodrich, as your orators are informed and believe, is about $4,100, exclusive of the indebtedness to said William and Eliza Haskins. That your orators respectively have proved their debts against the said Goodrich, and that they are, respectively, in the sums hereinbefore set forth; and that they, with the proofs thereof, have been filed with the clerk of the circuit court for the county of Clinton.

"That your orators have in writing requested the said assignee, Henry E. Walbridge, to take the necessary legal proceedings at once to set aside said chattel mortgage to William and Eliza Haskins, to the end that the entire property assigned to him may be applied *pro rata* to the payment of all the creditors of said Goodrich, but he has declined, and still does decline, so to do; and your orators are informed and believe that he intends to and

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will, unless restrained by the court, or the said property is taken away from him by said William and Eliza Haskins by virtue of the said chattel mortgage, sell and dispose of said assigned property, and first pay said chattel mortgage, to the great injury of your orators.

"That said William and Eliza Haskins are authorized by said chattel mortgage, which becomes due on the 1st day of January, 1888, whenever they shall deem themselves insecure, to take immediate possession of said mortgaged property; and your orators, from information and belief, fear that they will take possession of said property by virtue of said mortgage, to the injury of your orators, unless restrained by this court.

"To the end, therefore, that the said William Haskins, Eliza Haskins, George V. Goodrich, and Henry E. Walbridge, assignee of said George V. Goodrich, defendant herein, may full, true, direct, and perfect answer make to all and singular the premises, but not under oath, their answer under oath being hereby waived; and that said chattel mortgage may be held and declared to be a fraudulent and unjust preference of the said William and Eliza Haskins, and made with the intent to cheat, hinder, and delay your orators in the collection of their just debts, and may be decreed void, and be set aside; and that the proceeds of the sale of said mortgaged property may be distributed *pro rata* among the creditors of said Goodrich; and that a receiver, with the customary powers, may be appointed to take charge of said property, and execute the said assignment; and that the said assignee, Henry E. Walbridge, be enjoined from paying any of the proceeds of the sales of the assigned property to said William and Eliza Haskins upon said mortgage; and that said William and Eliza Haskins be enjoined from meddling with or taking possession of said assigned property under said mortgage till the further order of the court; and that your orators may have such other and further relief in the premises as shall be agreeable to equity and good conscience."

The bill also contains a prayer for injunction and subpœna, and is verified by the solicitor for complainants.

Demurrer to the bill is interposed by all the defendants, and for causes of demurrer the defendants allege:

"1. Because in no way or form is it alleged in com-

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plainants' bill that an order of said court was obtained to file and bring said bill of complaint into court without the aid of the assignee.

"2. That no bill of complaint can be filed and brought into court without the aid of the assignee or receiver.

"3. Because the court has no jurisdiction to entertain said bill of complaint, or grant the relief prayed for, or any part thereof.

"4. Because said complainants have, and had, a full, complete, and adequate remedy at law.

"5. Because said complainants had not, prior to filing their said bill of complaint, and the issuing of the injunction in this cause, and have not since, obtained any order of this court requiring the assignee to institute such contest.

"6. Because the bill of complaint in this case is multifarious."

The cause came on for hearing on the demurrer in the circuit court, in chancery, for the county of Clinton, on April 12, 1888; and the court held the demurrer good and sufficient, and made a decree therein dismissing said bill, with costs, but without prejudice. Complainants appeal.

Defendants' counsel now seek to bring this case within the ruling of this Court in *Sweetzer v. Higby*, 63 Mich. 13 (29 N. W. Rep. 506), and the cases there cited.

The bill in the present case charges the assignee, Henry E. Walbridge, with advising the assignor in the matter of the assignment, and in the making of the chattel mortgage, and alleges that the chattel mortgage was given to cheat, hinder, delay, and defraud creditors. The case is one where the fraud is charged upon the assignee as well as the assignor, and does not come within the cases above cited. It falls directly within the sixth section of the act relating to "Voluntary Assignments for the Benefit of Creditors" (How. Stat. § 8744), which provides:

"In case there shall be any fraud in the matter of

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said assignment, * * * any person interested therein may file his bill in the circuit court, in chancery," etc.

The sixth section was intended to give the creditors ample relief against the incompetency, neglect, or fraud of the assignee; and the bill in this case, we think, contains sufficient allegations of fraud against the assignee as well as the assignor, charging fraud in the matter of the assignment, to put the defendants to a defense of the case. In such cases it is not necessary to obtain the order of the court requiring the assignee to institute the proceedings. The creditors may maintain the bill without his intervention. He as well as the assignor is charged with the fraud in the matter of the assignment itself

The decree of the court below must be set aside, with costs, and the demurrer overruled. The defendants will have 30 days after filing *remittitur* in court below to file and serve answers to the bill, and upon their failure so to do the cause will proceed under the bill according to the rules and practice of the court. The injunction must be held in force until the cause is heard upon proof to be taken in the cause.

The other Justices concurred.

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ANTHONY SCHNEIDER v. THE CITY OF DETROIT.

Municipal corporations—Railroad crossings—Erection of bridge in city street—Charter of Detroit—Damages.

This case involves the right of the city of Detroit, under its charter as existing in 1885, to build a bridge for a crossing over a railroad track, in a public street in said city.

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1. CHAMPLIN, J., filed an opinion, concurred in by LONG, J., *denying* such right, and affirming a judgment recovered by plaintiff for injury sustained thereby in the usual and ordinary enjoyment of his abutting property.
2. CAMPBELL, J., concurred in the result, as did SHERWOOD, C. J., and MORSE, J., but held, further, that the city may build bridges where necessary for a safe passage, subject always to the payment of damages when it injures private property.

Error to Wayne. (Gartner, J.) Argued June 8, 1888. Decided November 1, 1888.

Case. Defendant brings error. Affirmed. The facts are stated in the opinion.

John W. McGrath, for appellant, contended:

1. This is not one of that class of cases where a *change* of grade has been made to the detriment of an abutting owner, no grade having been established on Thirteenth street prior to building the bridge, and the railroad tracks being from five to eight feet below the *natural* grade of the street. The cases of *Larkin v. Saginaw*, 11 Mich. 88, and *Pontiac v. Carter*, 32 Id. 164, seem to dispose of this case.

Corliss, Andrus & Leete, for plaintiff, contended:

1. The construction of a sewer beneath, or structure above, a highway, cannot be considered as within the meaning of the phrase "improving a highway;" citing *Clay v. Grand Rapids*, 60 Mich. 451.
2. Municipal corporations are restricted to such powers as are expressly conferred by charter or legislative authority, and must be able to show express authority in their charter for the acts they assume to perform; citing Cooley, Const. Lim. 231.
3. The occupation of a highway by a railroad company running its tracks through the street, without authority, is actionable, if any actual damage ensues to the adjacent owners; citing *Railroad Co. v. Heisel*, 47 Mich. 401; *Riedinger v. Railroad Co.*, 62 Id. 29.
4. The right of an owner of a lot in a city to the use of the adjoining street is a property right, of which he cannot be deprived without just compensation; citing *Rude v. St. Louis*, 93 Mo. 408.

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5. When obstructions in a street wholly, or to an unreasonable extent, cut off communications to the street from abutting property, the owner may recover damages; citing *Lackland v. Railroad Co.*, 81 Mo. 181; *Bridge Co. v. Schaubacher*, 57 Id. 582; *Ferrenbach v. Turner*, 86 Id. 416.

CHAMPLIN, J. The plaintiff is the owner of two lots in the city of Detroit, each 30 feet in width, extending from Lafferty street easterly 120 feet, to Thirteenth street, upon which two cottages were erected fronting on Lafferty street, prior to the opening of Thirteenth street, in 1881.

In 1881 the proper proceedings were had, and Thirteenth street was opened in the rear of plaintiff's lots; about 16 feet in width being taken from these lots therefor, by condemnation proceedings, for which he was fully paid the damages awarded. This gave to plaintiff two frontages,—one on Lafferty and the other on Thirteenth street.

At the time Thirteenth street was opened, it was projected across the right of way and tracks of the Michigan Central Railroad Company, for which it was awarded damages. The road-bed and tracks of the railroad company are from five to eight feet lower than the natural level of the land in Thirteenth street at the point of crossing, and there are 12 distinct and separate railroad tracks, crossing the line of Thirteenth street, in use and operation. The distance of plaintiff's premises from the railroad is about 100 feet.

No crossing having been made prior to 1885, in that year, by mutual agreement as to expense of construction, the common council of the city of Detroit, by proper and appropriate proceedings, declared and determined that a bridge over the tracks of said Michigan Central Railroad Company, on Thirteenth street, was and is a public necessity; and thereupon such proceedings were had that

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a bridge was constructed over and across the railroad track at the joint expense of the railroad company and the city; and all of the proceedings in the opening of said Thirteenth street, and in the erection and construction of the bridge, and of the approaches thereto, were in accordance with the resolutions and proceedings of the common council, and regular, but without the consent of the plaintiff.

The southerly approach to the bridge commences south of, and extends past, the plaintiff's premises, upon an ascending grade, occupying 32 feet in width of the street, which is 60 feet in width. It is carried up with stone abutments, filled between, and the westerly abutment is 13 feet from the east line of plaintiff's premises, and is from 6 to 8 feet in height in front of his lots, with an iron fence about 3 feet in height surmounting the abutment.

Plaintiff showed that the Thirteenth street frontage of his lots was the most desirable, and that by reason of the obstruction caused by the bridge the use of such frontage was impracticable, and against defendant's objection he was permitted to show that his premises were damaged by the flow of surface water upon them. This testimony as to damage caused by surface water was inadmissible, under the declaration, which counted solely upon the deprivation of the use of the highway caused by the obstruction.

The defendant offered to prove that prior to the construction of the bridge no grade had been established on this portion of Thirteenth street, but on plaintiff's objection such testimony was excluded as being irrelevant and immaterial.

The circuit judge, after reciting the facts, charged the jury as follows:

"Now, gentlemen of the jury, as far as the streets are

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concerned, and the grading of the streets, there is no question but that the city of Detroit has the right to establish grades, and to change grades. The city has the right to make use of the streets for the common and ordinary purposes for which streets are used; but the city has no right to practically destroy the street in front of a man's house; and the question here is as to whether this street in front of the plaintiff's lot is not practically destroyed. Now, I shall hold, as a matter of law, that this space of about 13 feet between the plaintiff's lot and this abutment or approach to the bridge, this wall being built up there 8 or 10 feet high, that practically destroys the street as far as the plaintiff's lots are concerned. It only leaves him a space of about 13 feet.

"Now, the city of Detroit has constructed this; and, having done this, I shall charge you, gentlemen of the jury, in this case, that the only question for you to determine is as to whether the plaintiff's property has depreciated in price, and as to whether the putting of this street in the condition which it is admitted now to be, as to whether that has depreciated the value of plaintiff's property. If it did depreciate it,—if the practical destruction of this street, as far as this property is concerned, if this condition of affairs, has depreciated the plaintiff's property,—why, then, gentlemen of the jury, he is entitled to recover for such depreciation. So if you find that the construction of this bridge has depreciated the value of the plaintiff's property, then the next question for you to determine will be the amount of damages.

"Upon this question I have very little to say, and very little is necessary to be said. He is entitled to recover the difference between what his property was worth prior to the construction of that bridge there, and what it was worth after the bridge was constructed, and Thirteenth street left in the condition in which it has been since the construction of the bridge. So that, gentlemen of the jury, if you find that the property was depreciated by the construction of this bridge, you want to ascertain what the difference in the value of the property before and after was, and the plaintiff is entitled to recover what the difference is.

"I am requested by the counsel for the defendant to charge you that, under the declaration and pleadings in this case, the plaintiff is not entitled to recover. I shall refuse to give you that request, and I shall leave the

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question to you as to whether this property was depreciated; if it was, it is for you to say how much it was depreciated in value."

The jury returned a verdict for the plaintiff.

If the common council of the city of Detroit had authority to construct the bridge over the railroad tracks, all their proceedings having been regular, and the bridge and approaches having been erected according to the plans adopted, the city is not liable in this action.

This was settled as the law in this State in *Pontiac v. Carter*, 32 Mich. 164, in an exhaustive opinion by Mr. Justice COOLEY, and concurred in by the whole Court. It has been 13 years since that opinion was delivered, and the law should not be overturned without the clearest conviction that the opinion then delivered was wrong, and that justice requires that it should be reversed. No new arguments have been advanced in behalf of the liability of the municipality in such cases, and while we are aware that, in particular instances, the rule then adopted may operate harshly, yet in a majority of cases it does not do so, and in many cities and villages public improvements could not be made without bankrupting the treasury, or imposing grievous taxation upon the property of citizens at large.

The declaration in this case does not question the authority of the common council, but virtually concedes the fact. It says:

"That heretofore, and for a long space of time, to wit, for the space of 20 years last past, and at the time of the injuries herein complained of, the said defendant was and still is a municipal body corporate and politic, and a city under the laws of the State of Michigan, and as such has supervision and control of the streets and highways within the limits of the city."

The charter of the city of Detroit provides that the common council shall have power to establish, open,

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widen, and extend streets and avenues within the city, and to grade, pave, repair, and otherwise improve said streets and highways. Local Acts of 1883, Act No. 326, § 33, chap. 7.

Having determined to open and extend Thirteenth street across the railroad company's tracks, and condemned the right of way therefor, is the authority necessarily implied that the council may cross the railroad at grade, or under or over the railroad tracks? They are given power to establish the grade without restriction, upon streets where no prior grade has been established.

Section 38 of the same chapter authorizes the common council to establish, construct, repair, enlarge, and discontinue, within the streets, avenues, etc., in said city, such bridges, etc., as the common council may see fit, with a view to the proper sewerage and drainage of said city. This is the only section of the charter conferring in express terms authority upon the common council to erect a bridge within a street, and here such authority is restricted to the purpose of sewerage or drainage, and does not extend to the purpose of securing a safe crossing of a railroad track by erecting a bridge in the street.

"Bridges are usually part of the street or highway, and in this country the power of municipal corporations to build them, and their authority over them, are wholly statutory, and their duties in respect to them are either prescribed by statute, or spring from their powers. There is no common-law responsibility on municipal corporations in respect to the repair of bridges within their limits; but where bridges are part of the streets, and built by the municipal authorities under powers given to them by the legislature, they are liable for defects therein on the same principles, and to the same extent, as for defective streets." 2 Dill. Mun. Corp. § 728 (579).

The duty attaching to the city of Detroit to keep these bridges over the railroads in repair, and the liability for injuries arising from its default, aside from the expense

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incurred in erecting them, challenge the closest investigation to ascertain if any statutory authority exists in the common council to erect such bridges in the streets. It may safely be asserted that there is no express authority; and section 38, above referred to, by granting express authority to construct bridges within streets for certain specified purposes, by the well-known canon of construction, would seem to exclude the authority for any other purpose.

Is the authority implied from the section conferring power to grade, improve, or extend streets? It is familiar law that a municipal corporation possesses and can exercise no powers which are not granted in express terms, or those which are necessarily or fairly implied in or are incident to the powers expressly granted, or those which are essential to the declared objects and purposes of the corporation. 1 Dill. Mun. Corp. § 89 (55).

I do not think it is either expressly given or necessarily implied by the terms of the charter. The construction of bridges over railroads is not the ordinary or usual method of grading streets. The exercise of the power to erect such bridges in streets would necessarily involve quite an amount of abutting property in damage, and some entirely in destruction, for any beneficial use or enjoyment. Such consequences cannot be brought under the general power to grade streets, but must be provided for under the power of eminent domain. Private property cannot be appropriated for the public use without the necessity therefor is first determined by a jury under our Constitution, and compensation awarded and paid.

Doubtless the method of crossing a railroad by a viaduct is safer than a crossing at grade; and upon streets which are recognized thoroughfares, over which the public are almost constantly passing, such bridges would greatly

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conduce to the public safety and convenience, and it would be wise for the Legislature to confer upon municipalities the authority to erect such structures in the streets, and condemn private property for that purpose, if necessary; but, until this is done by special enactment, I do not think it can be done under the power now conferred by the general authority to grade, make, repair, and improve streets. It follows that the city authorities had no right to erect the bridge in the street in question, so as to injure plaintiff in the usual and ordinary enjoyment of his property, and the city is liable to him for the injury for which he has complained in damages.

The testimony which was admitted, relative to the injury by the flow of water upon plaintiff's premises, was not injurious to defendant under the charge of the court, which confined the jury to the sole question of the depreciation caused by the obstruction of the street in front of plaintiff's property.

Under the view I have advanced above, of the want of authority in the city to construct the bridge, the rejection of the testimony offered by defendant, above mentioned, was not erroneous.

The judgment will be affirmed.

LONG, J., concurred with CHAMPLIN, J.

CAMPBELL, J. I agree in the result arrived at by my Brother CHAMPLIN. But I have no doubt the city may build bridges where necessary for a safe passage, subject always to the payment of damages when it injures private property, as was done here.

SHERWOOD, C. J., and MORSE, J., concurred with CAMPBELL, J.

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THE DIAMOND MATCH COMPANY v. THE VILLAGE OF ONTONAGON ET AL.

Town plats—Dedication of land for streets—Acceptance—Estoppel —Town-site—Patent to district judge in trust.

1. In a contest between the owner of adjoining land and a municipal corporation claiming the existence of a public street or highway over such land, the burden of proof is upon the municipality. *Mining Co. v. Mason*, 23 W. Va. 211; *Miller v. Town of Aracoma*, 5 S. E. Rep. 148.
2. The object of the act of Congress (5 Stat. at Large, 657) "for the relief of citizens of towns upon the lands of the United States, under certain circumstances," and of Act No. 204, Laws of 1861, authorizing the district judge of the Upper Peninsula to convey certain lands held in trust under said act of Congress, was to protect the rights of *actual* occupants, which is fully done by extending to them the principles which have been so often applied for a like purpose when a proprietor of land has platted it into a town-site, but not so as to effect a legal dedication, and sold land to individuals in accordance with the plat.
3. As between the proprietor of land which he has platted into a town-site, but not so as to effect a legal dedication, and purchasers from him according to said plat, they are entitled to have the streets necessary or convenient for their use and enjoyment of the property so purchased kept open for their own and the public's use. But such proprietor is not estopped from reclaiming or closing any street or portion thereof delineated on the plat, where private rights are not directly affected, and as against the municipality claiming the streets, where the public have not acquired rights by user, or acceptance of the offer to dedicate, indicated by the platting, the owner is not estopped. He may revoke or recall said offer before actual acceptance at any time, when the plat has not been executed in accordance with the statute, and placed upon record.
4. One of the ordinary meanings of the word "lot" given by lexicographers is "that portion of ground which is allotted or assigned to any one, and hence a distinct portion of land."
5. Proof of the acceptance of the land dedicated by its owner to the public use must be unequivocal and convincing.

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6. In this case, it is held that the testimony fails to show either a dedication or an acceptance of the land in dispute, as a street; and that the complainant shows itself in possession of said land, claiming title, and, as against an intruder who threatens to enter and dispossess it for the purposes of a public street or highway, it shows a right to equitable relief by injunction.

7. The following propositions are summarized from the opinion of Mr. Justice CHAMPLIN:

a—The position assumed, that the United States by its patent to Judge Goodwin, as trustee, in trust, dedicated the land platted as streets to public use, is too broad. The implication from the grant is that the land patented had been settled upon and occupied as a town-site, and the grant was made in trust for the several use and benefit of the occupants thereof, according to their respective interests.

b—Congress intended by the act of 1844 (U. S. Rev. Stat. § 2387) that as to unoccupied lots the Legislature might authorize the trustee to make a survey and plat, and dedicate the streets and public grounds to the public use, or it might authorize a sale in such parcels as they should deem the situation of the town, its probable future, and its circumstances should require.

c—The mention by the Legislature in a recital to Act No. 204, Laws of 1861, of the fact that the lands held in trust by Judge Goodwin had been surveyed and laid out into town lots and blocks, and are known as the village of Ontonagon, and additions thereto, does not expressly adopt or ratify such survey or plat, if, indeed, it would be competent for it to do so. The legal title had passed from the United States to the trustee, and he would be the only competent person to dedicate the land to public uses.

Appeal from Ontonagon. (Williams, J.) Argued June 8, 1888. Decided November 1, 1888.

Bill to enjoin the disturbance of the possession of complainant of land claimed by defendants as a public street. Defendants appeal. Decree modified and affirmed. The facts are stated in the opinion.

Stone & Gray, for complainant, contended:

1. The complainant represents and stands in the place of the occupants of this property, when the patent was made, and holds the equitable title thereto; citing *Cofield v. McClelland*, 16 Wall. 331; *Hussey v. Smith*, 99 U. S. 20; and is therefore in a position

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to invoke the aid of this court in securing the enjoyment and possession of the property.

2. A dedication under our statute can be made by the proprietor or owner of the land only, and, if one having no title should make and record a plat, he would not be estopped from claiming the lands therein purported to be dedicated, under a subsequently acquired title, unless the public had done some act in reliance upon the plat that would make the claim inequitable; citing *Lee v. Lake*, 14 Mich. 12; *People v. Jones*, 6 Id. 176; *Detroit v. Railroad Co.*, 23 Id. 201.

3. The evidence shows that what is known as Copper street, upon the island, has been for a number of years past used the same as the adjoining blocks, and that it has never been used as a street. The user shown is neither decisive, general, nor long enough continued; citing *Gould v. Glass*, 19 Barb. 179; *Smith v. State*, 8 N. J. 130; *Hoole v. Atty. Genl.*, 22 Ala. 190; *Kilburn v. Adams*, 7 Metc. 39.

4. An acceptance of an offer to dedicate, by a user of a street, is only binding or good as to that portion of the street actually used by the public, and so long as there has been no acceptance of the grant or offer to dedicate, either by the action of an authorized body or by a public user, the adjoining owners may withdraw such offer, and any act of theirs which goes to show their intention to use and occupy such street for private purposes, would amount to a withdrawal; citing *People v. Beaubien*, 2 Doug. 256, 286; *People v. Jones*, 6 Mich. 176; *Lee v. Lake*, 14 Id. 12; *Baker v. Johnston*, 21 Id. 319; *Detroit v. Railroad Co.*, 23 Id. 174; *Field v. Manchester*, 32 Id. 279; *Cooper v. Detroit*, 42 Id. 589; *Buskirk v. Strickland*, 47 Id. 391; *Plumer v. Johnston*, 63 Id. 165.

5. Merely traveling or passing over land for any length of time will not convert it into a public highway. It must have been accepted as such by the public authorities; citing *Irving v. Ford*, 65 Mich. 241 (32 N. W. Rep. 601, and numerous cases cited in note); *Scheimer v. Price*, Id. 638.

C. F. Button (*Ball & Hanscom*, of counsel), for defendants, contended:

1. The platting by Paul, the conveyance in trust to the district judge, and Act No. 204, Laws of 1861, make a complete and irrevocable dedication to the public of all the streets marked on the plat, and these, with the provision requiring the proceeds of the sale of lots to be expended in grading and improving "the streets of the said town-site of Ontonagon," in connection with the act of Congress, make the dedication and

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acceptance complete, not of a part of the streets, nor of those parts which might be used as highways at that particular time, but of the streets according to the plat; citing *Parcher v. Ashby*, 1 Pac. Rep. 204.

2. That portion of Copper street which is upon the main-land is conceded to be one of the public highways, as it appears upon the original plat, and Houghton and Ontonagon streets, running parallel therewith and crossing the island, and connected therewith by bridges, have always been recognized as public highways of said village, and there is nothing to show why there should be any distinction between these streets, as regards the rights of the public therein. They are each a part of the original plat or plan of the village of Ontonagon, and as old as the town itself, and have been used by the public for more than 30 years. This is evidence of acceptance by the village, and the fact that no work has been done upon that part of Copper street upon the island can have but little, if any, significance; citing *Com. v. Moorhead*, 12 Atl. Rep. 424.
3. Every deed introduced in evidence by complainant, bearing date since the platting by Paul, describes the property intended to be conveyed by lots and blocks, according to the recorded plat of the village; and this fact of itself estops the complainant from disputing the dedication and acceptance of the street; citing *Marble v. Price*, 54 Mich. 466.
4. Complainant has failed to show *non-user* of the street, as alleged in its bill. [Counsel discuss the testimony at length, in support of this proposition.—REPORTER.]
5. The foregoing evidence not only disposes of this claim, but establishes the fact of acceptance by the public of Copper street on the island, as a highway and street in the village. So far as the public was concerned, no actual act of acceptance, save by user, could have been manifested, for the reason that there were no corporate authorities in said village until its incorporation in 1885; citing *Baker v. Johnston*, 21 Mich. 340.
6. Complainant has failed to show title by deed or estoppel to the land in question.
7. Complainant has failed to establish title or estoppel by adverse possession; citing *Yelverton v. Steele*, 40 Mich. 538; *Jackson v. Woodruff*, 13 Am. Dec. 525; *Marble v. Price*, 54 Mich. 466.

CHAMPLIN, J. The Ontonagon river empties into Lake Superior in section 25, township 52 N., range 40 W.; and passes through the section in a north-westerly direction. The shore of Lake Superior at this point runs about

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south-west and north-east. Within the government survey of section 25 there is an island in the river, surveyed, and known as "Lot 4." The river is navigable on both sides of this island through the section, the main part of the river and the main channel being on the west side. The width of the channel on the east side varies, but at a point designated as "Copper Street," on the "Plan of the Town of Ontonagon," is 100 feet wide.

The village of Ontonagon was incorporated by an act of the Legislature, approved March 20, 1885, entitled—

"An act to incorporate the village of Ontonagon, in the township of Ontonagon, county of Ontonagon, and State of Michigan."

A township by that name, including within it the same territory, had existed for a number of years. The record before us does not show the date of its organization, but the county of Ontonagon was first incorporated in 1848.

In 1854 one James K. Paul caused to be recorded in the office of the register of deeds of Ontonagon county a plat of a town, designated as a "Plan of the Town of Ontonagon," which embraced the territory included in the United States survey of the public lands described as lots numbered 1, 2, 3, 4, 5, and 6 of section 25, township 52 N., range 40 W. Lots 1, 2, and 3 lie on the east side of the river, lot 4 is the island, and lots 5 and 6 lie on the west side of the river. In this plan he laid out the land into blocks and lots, streets and alleys. The blocks and lots are numbered, and the names of the streets appear thereon. On the east side of the main channel of the river the blocks are numbered from 1 to 63, and on the west side from 1 to 15. It thus appears that the main part of the plan was on the east side of the river.

The design of the plan evidently was that the streets on the east side should project across the east channel,

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and run across the island, and terminate at the main channel of the river, these streets on the island forming the boundaries of the blocks, which are numbered from 1 to 10, inclusive; and nine streets appear thus to have been projected across the island.

It is not claimed, and there is no evidence in the record, that Paul was the owner or proprietor of the land which is embraced in the plan recorded, nor is there any evidence that he ever afterwards acquired the legal title thereto.

By an act of Congress, approved May 23, 1844, entitled "An act for the relief of citizens of towns upon the lands of the United States, under certain circumstances," it was provided that, whenever any portion of the surveyed land of the United States had been or should be *settled upon and occupied* as a town-site, it should be lawful, if the town was unincorporated, for the judge of the county court to enter the land, in trust for the several use and benefit of the occupants thereof, and according to their respective interests; the execution of the trust as to the disposal of the lots in such town, and the proceeds of the sale thereof, to be conducted under such rules and regulations as might be prescribed by the legislative authority of the state or territory in which the same is situated. 5 Stat. at Large, 657; U. S. Rev. Stat. (2d ed.) § 2387.

The Legislature of the State of Michigan passed an act which was approved January 29, 1853, entitled—

"An act to authorize the district judge of the Upper Peninsula to hold in trust and convey lands included in the town-site of the village of Ontonagon."

This act came under review in this Court *In re Selby*, 6 Mich. 193, and it was held that it did not confer jurisdiction in the district judge to act in the matter, and

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that in so far as the Legislature attempted in such act to dispose of the land it was void.

The next step, as will be seen, after the passage of the act by the Legislature of Michigan in 1853, was the placing upon record by Paul, in January, 1854, of the plan referred to, and following this, in 1856, was the entering by Daniel Goodwin, district judge, of the lots hereinbefore described, together with lot No. 1, in section 36, in the same town and range, and which was made the subject of special legislation by Act. No. 11 of the Session Laws of 1858, similar to that of 1853, and which, although not in question in the case referred to, is governed by the conclusions there reached.

A patent was issued to Daniel Goodwin, district judge, of said land, in trust for the several use and benefit of the occupants thereof, according to their respective interests, which bears date November 28, 1856.

In 1861 the Legislature of Michigan passed an act entitled—

"An act to authorize the district judge of the Upper Peninsula to convey certain land held in trust under the act of Congress of May 23, 1844." Act No. 204, Laws of 1861.

This act recites that—

"The judge of the district court of Upper Peninsula for Ontonagon county has received from the United States, under said act of Congress, and now holds the same subject to and in trust for certain persons interested therein, which lands have been surveyed and laid out into town lots and blocks, and are known as the village of Ontonagon, and additions thereto."

The act then authorizes the judge of the district court, and his successors in office, to exercise full jurisdiction over and concerning said lands, and the disposition thereof to the several occupants entitled thereto, according to the true intent and meaning of said act of Con-

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gress. It then prescribes the rules and regulations under which the disposition is to be made, and that—

"At the expiration of one year, after notice has been given, as provided in section 1, the district judge shall cause all the lots or parts of the land occupied as such town-site, not included in any street, alley, or public ground, and not conveyed by deed, as hereinbefore provided, and remaining vacant and unoccupied, to be advertised for sale."

It further authorizes a sale to the highest bidder, and then enacts:

"The proceeds of such sale, after the payment of the expenses, and the proportion of the costs and expenses necessarily incurred in the entry of the town-site of said town of Ontonagon, shall be paid over to the treasurer of the township of Ontonagon, and shall be applied by the highway commissioners of said township to the grading and improvement of the streets of said town-site of Ontonagon."

Nothing appears ever to have been done under this act of the Legislature, passed more than a quarter of a century ago. On the 2d day of November, 1885, the village council of Ontonagon adopted the following resolution:

"*Whereas*, it appears to this board it is necessary for a bridge to be constructed across the slough on Copper street, for the benefit of the public travel; be it resolved that the street commissioner be instructed to advertise for bids for the building of such bridge at once, to put the street in proper condition for winter use."

The complainant and those under whom it claims title have been in the undisturbed possession of blocks 6 and 7, which would abut on Copper street where it would cross the island if extended, for 15 years or more last passed. They have erected a saw-mill upon block 6, and have used and occupied the land which would be in Copper street according to the plat where it crosses the island for their private use; have built tramways for running out lumber across such street, have piled lumber along

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the west side without regard to any street being there, and have docked up along the east channel, called the "Slough," and extended such dock along the shore and across Copper street, and used the same for their private purposes for four years or more; and complainant now claims the ownership of the land in the so-called "Copper Street," and claims that the village has no right to said street, nor the public to the use thereof as a street. No work was ever done by the municipal authorities, either township or village, on that part of Copper street where it crosses said island. Considerable testimony was introduced on the one side to show that it had never been used or traveled by the public as a highway, and on the other to show its occasional use by the public as such highway.

In a contest between the owner of adjoining land and a municipal corporation claiming the existence of a public street or highway over such land, the burden of proof is upon the municipality. *Mining Co. v. Town of Mason*, 23 W. Va. 211; *Miller v. Town of Aracoma*, 5 S. E. Rep. 148.

Upon a review of the testimony I do not think a highway by user has been made out, or such unequivocal acts of use by the public of this portion of Copper street as implies an acceptance by the public. As before stated, Paul was not the owner or the proprietor of the land covered by the plat when he placed it upon record.

The law relating to town plats in force at the time required such maps or plats as were required to be recorded to particularly set forth and describe all the public grounds within such town, by their boundaries, courses, and extent, and whether they be for streets, alleys, commons, or other public uses, and all the lots intended for sale, by progressive numbers, and their pre-

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cise length and width; and the maps made and acknowledged before a justice of the peace, a notary public of the proper county where the town lies, or before any judge of any court of record, and certified under the hand and seal of the judge, justice, or notary public taking such acknowledgment, and recorded, should be deemed a sufficient conveyance to vest such parcels of land therein expressed, named, or intended to be for public uses, in the county in which such town lay, in trust to and for the purposes therein named, expressed, or intended, and for no other use or purpose whatever.

The acknowledgment was taken before a justice of the peace. But it is not certified under his seal; nor are the public grounds, streets, or alleys set forth and described by their boundaries, courses, and extent; nor is the precise width of the streets, or the width and length of any of the lots, marked upon the map, or anywhere stated or described; nor is the particular land platted anywhere stated or described. There is a scale of feet in the margin, indicating an horizontal distance of 50, 100, 200, 300, and 400 feet, and divided perpendicularly into 10, 20, 30, 40, and 50 feet. This scale is too imperfect to determine the width of the streets and lots upon the plat. The horizontal distance of 50 feet does not correspond with the distance of 50 feet designated upon the perpendicular scale. There is no known boundary or monument given as a base line or starting point of the survey. All that can be said of it is that it is a mere plat upon paper, and in no sense a compliance with the statute, and was not such a map or plat as, when recorded, vested the fee in the county, or effected a dedication of the streets to the public use.

The answer of defendants admits that Paul had no title, and they do not claim that he ever made any dedi-

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cation at all. But they claim that the dedication of the streets for public use came from the United States; that the title was in the United States, and, under the act of Congress referred to, the occupants of the lots under the survey and plat of James K. Paul acquired certain easements, rights, and interests in the streets and alleys which had been laid out and used adjacent to the lots so occupied; that the act of Congress was for the very purpose of enabling the occupants of lots so situated to become the owners of the land they so occupied, according to their respective interests; that disposing of the lands covered by a town to the occupants could not be done, except that the streets and alleys therein for public use were reserved to the public; that the provision for sale by the district judge in the law of 1861 not only expressly recognized the plat, but recognized the fact that the streets and alleys on that plat did not belong to the trustee, having already passed by dedication from the United States to the public; that the land covered by the town-site as platted was conveyed by the United States to the trustee, for the use and benefit of the occupants thereof, and this was a recognition of the fact that there was already an existing village thereon.

The argument is good so far as the rights and interests of occupants of the town-site are concerned. The object of the legislation, National and State, was to protect the rights of actual occupants, and it does so fully by extending to them the principles which have been so often applied for a like purpose when a proprietor of land has platted it into a town-site, but not so as to effect a legal dedication, and sold land to individuals in accordance with the plat.

As between individuals so purchasing and the proprietor, they are entitled to have the streets necessary or convenient for their use and enjoyment of the property

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purchased by them kept open for their own and the public's use. But such proprietor is not estopped from reclaiming or shutting up any street or portion thereof delineated on his plat, where private rights are not directly affected; and as against the municipality claiming the streets, where the public have not acquired rights by user, or acceptance of the offer to dedicate, indicated by the platting, the owner is not estopped. He may revoke or recall his offer to dedicate before actual acceptance at any time, when the plat has not been executed in accordance with the statute, and placed upon record. *City of Galveston v. Williams*, 69 Tex. 449 (6 S. W. Rep. 860); *People v. Beaubien*, 2 Doug. 256; *People v. Jones*, 6 Mich. 176; *Baker v. Johnston*, 21 Id. 319; *Detroit v. Railroad Co.*, 23 Id. 173, 209; *County of Wayne v. Miller*, 31 Id. 447; *Board of Supervisors v. Banks*, 44 Id. 467 (7 N. W. Rep. 49); *Buskirk v. Strickland*, 47 Id. 389 (11 N. W. Rep. 210).

The position assumed, that the United States, by granting a patent to Judge Goodwin, as trustee, in trust, thereby dedicated the land platted as streets to the public use, is too broad. The implication from the grant is that the land embraced in the patent to Goodwin had been settled upon and occupied as a town-site, and the grant was made to Judge Goodwin in trust for the several use and benefit of the occupants thereof, according to their respective interests. Nothing is said in the law or in the patent of any plat of a town-site. No law of Congress or of this State at that time authorized such platting. The land which the act of Congress contemplated might be settled upon and occupied as a town-site was land which belonged to the United States, and was not subject to private entry or private sale. It contemplated that settlers and others had, to use a well-known expression, "squatted" upon it, and staked out or fenced in their respective lots.

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Mr. Justice MANNING, in the case cited from 6 Mich., called attention to the fact that the act of Congress referred to was vague and indefinite in most of its provisions, and especially to the word "lot," as used in the act, and said that its use would seem to imply a previous platting or laying out of a town; that is, as I conceive the learned Justice to have meant, before the land was "disposed" of; and he clearly intimates that the Legislature should provide for such platting in order to carry out the intent of Congress, and apply the language of the act to the subject-matter. This necessarily must be so; for, as before observed, until such legislation by the State Legislature, there existed no authority for any one to plat the public domain into lots for a town-site.

He says, at page 215:

"I think the rules and regulations to be made by the local legislature are to have reference to the settlement of such questions, as well as to the disposition of the part of the town not actually occupied for town purposes by individuals. Shall the part not occupied be platted into lots, and be sold? Shall any of it be reserved for public buildings? For what public purpose shall the proceeds of the sale be appropriated? These and the like questions are to be answered by local legislation."

I think that Congress intended that as to unoccupied lots the Legislature might authorize the trustee to make a survey and plat, and dedicate the streets and public grounds to the public use, or it might authorize a sale in such parcels as they should deem the situation of the town, its probable future, and its circumstances should require. I think, also, that the word "lot" in the act of Congress applied equally to the land actually occupied by the residents of the town-site. One of the ordinary meanings of the word given by lexicographers is—

"That portion of ground which is allotted or assigned to any one, and hence a distinct portion of land."

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In making regulations for the disposition of the lots it might be that there would be more than one claimant, or the occupant might not establish his right, and in such case I think it would be competent for the Legislature to authorize the sale or other disposition of such lot, as also it might do if an occupant neglected or refused to pay his just proportion of the expense of entering the land. It is true, the Legislature has mentioned the fact that the lands held in trust by Judge Goodwin had—

"Been surveyed and laid out into town lots and blocks, and are known as the Village of Ontonagon, and addisions thereto."

This mention, however, occurs in a recital, and does not expressly adopt or ratify such survey or plat, if, indeed, it would be competent for them to do so. The legal title had passed from the United States to the trustee, and he would be the only competent person to dedicate the land to public uses.

In the case of *Hamilton v. Railroad Co.*, 124 Ill. 235 (15 N. E. Rep. 854), the court passed upon the effect of a statute recognition of a plat. The acts relied on as showing an acceptance were:

1. The proceedings of the common council of Chicago in 1854, adopting an ordinance for "planking Blue Island avenue," and the assessment to pay for this improvement.
2. The fact that from 1851 the property was assessed for taxation under the description of lots and blocks.
3. An act of the legislature in 1865, entitled "An act to authorize the dedication, resubdivision, and partition of Canalport, in Cook county," and an amendatory act in 1869, conferring like powers on the superior court of Chicago.

With reference to the third point the court said:

"The act of the legislature of 1865, which is referred to as an acceptance of the dedication, provides that the

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proprietors of a majority in numbers of the lots in Canalport may file a petition in the circuit court in chancery, making the other proprietors parties, and authorizes the court, on such petition and notice to the other proprietors, to appoint commissioners, etc., and enter a decree vacating the subdivision, and replatting and partitioning the property among the several proprietors. This act recognizes the existence of the plat of the subdivisions that there were private rights in respect thereto, and provides for a partition among the lot-owners. But we are unable to perceive that in this there was any recognition that there had been an acceptance by the public of the dedication of the streets. There might well have been private rights in respect to streets in grantees of conveyances made under the plat, although there may have been no complete dedication of the streets to the public by an acceptance of the proffered dedication, as we have before suggested. The above are the facts which are relied upon as showing an acceptance. We find them to be insufficient, and that there was no acceptance by the public of the dedication of the streets."

The same reasoning applies to the case before us. As before observed, the main object of the legislation was to protect private rights. There is no intent apparent that the Legislature intended to accept the dedication of the Paul plat.

Proof of the acceptance of the land dedicated by its owner to the public use must be unequivocal and convincing. Such acceptance imposes duties upon the municipality which are onerous, and greatly increases its liability for injuries occasioned for the non-rèpair of streets. In this particular instance the burden would be peculiarly onerous. There are nine streets projected across this arm of the river or "slough," as it is called, thus imposing upon the village the duty of building nine bridges, and keeping them in repair and safe for the public travel. The streets across the island are of no sort of use unless connected with the main-land by some sort of viaduct. This is accomplished in the winter season,

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as to those streets more remote from the lake by the formation of ice, but the public have the right to the use of the streets for travel, and especially would the owners of property adjoining the streets on the island, both in winter and summer. I do not think from the testimony either that a dedication or an acceptance thereof, if one could be said to have been made, has been shown.

There is another very important question affecting the right to assert any claim under the act of Congress, and that is the point raised by Mr. Justice CAMPBELL *In re Selby*, 6 Mich. 208, above referred to. He said:

"But the law did not authorize the judge to enter any subdivision not settled upon and occupied as a town; and if this was not thus occupied, it was not withdrawn from private pre-emption."

This island by the government survey was returned by the surveyor general as a separate lot or subdivision. I do not find any testimony showing that this island was occupied as a town-site at the time Judge Goodwin entered it as such. The question is not raised by the pleadings, and it is not necessary to pass upon it here. Neither do I think it is necessary to pass upon complainant's title, which was based in part upon tax deeds. It shows itself in possession, claiming title; and as against an intruder who threatens to enter and dispossess it for the purposes of a public street or highway, I think it shows a right to equitable relief by injunction.

The circuit court decreed that complainant had an indefeasible title to the lots adjoining, and to Copper street where it crosses the island. The decree of the circuit court will be modified by omitting that portion referring to complainant's title, and reciting that it is threatened to be disturbed in its possession of the land

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called "Copper Street," where it crosses the island. The balance of the decree will be affirmed, with costs.

The other Justices concurred.

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JOHNSTON HARVESTER COMPANY v. JOSEPH MILLER.

Bills and notes—Execution by maker—Evidence—Cross-examination—Expert testimony—Genuineness of signature—Bona fide holders—Principal and agent—Fraud—Ratification.

1. Where the execution of a note is denied by the defendant, and the agent who claims to have taken it for the plaintiff swears that he was present and saw the defendant sign it, he may be cross-examined fully as to all that took place at the time of such alleged signing.
2. Where an agent for a harvester company went with a debtor of his to the house of a party who had given said debtor a note for "Bohemian oats," and by agreement between the three the Bohemian-oat note was surrendered, and a note for the same amount given by the payor to the harvester company upon one of its printed blanks, purporting to be for a machine sold to the payor, and in a suit by the company upon the note the agent testifies to its execution, and on his cross-examination denies having any knowledge of the consideration for the note in place of which it was taken until after such exchange, he may be asked if he has not stated out of court that he had such knowledge, and if he denies making such statements the defendant may prove them as a part of his defense.
3. In a suit upon a note, the execution of which is denied by the defendant, he may show by the cross-examination of an agent who claims to have taken it for the plaintiff, and who swears to its execution by defendant, as affecting the credibility of the witness, the negotiation by him prior to the date of the note in suit of another forged note purporting to be signed by the defendant, which testimony is also admissible as tending to show that the witness obtained the note in suit fraudulently. *Stubly v. Beachboard*, 68 Mich. 402 (head-note 5).

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4. Where expert witnesses testify, entirely from comparison, to the genuineness of a disputed signature, it is competent on cross-examination, for the purpose of testing the value of their testimony, to show them other signatures properly in evidence, purporting to be made by the same person, and by their comparison of the same to show that they differ radically in their views of the similarity of letters, and that they might be easily mistaken in their assumptions from such a comparison; and the fact that the witnesses do not know whether the latter signatures were made by one man or two but adds to the value of the test.

5. A principal cannot ratify the fraud of an agent by accepting a note which is the fruit of such fraud, and suing upon it, and at the same time claim to be a good-faith holder of the note because the agent failed to acquaint him with the circumstances under which he procured it when he sent it to the plaintiff, who was led to suppose that he had taken it in the ordinary course of his agency.

Error to Wayne. (Brevoort, J.) Argued June 13, 1888. Decided November 1, 1888.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Sprague & Carey, for appellant, contended:

1. The plaintiff made a *prima facie* case by proving the execution of the note by the witness Reynolds, who became defendant's witness as to matters of defense drawn out on cross-examination, and the defendant could not impeach him generally, nor in respect to those matters; citing *Jackson v. Son,* 2 Cal. 178; *People v. Moore,* 15 Wend. 419; *Fairchild v. Bascomb,* 35 Vt. 398; *Trustees v. Ins. Co.,* 23 How. Pr. 448; *Craig v. Grant,* 6 Mich. 447.

2. Questions lacking certainty of time, place, and persons present are not properly framed for impeaching questions; citing *Smith v. People,* 2 Mich. 416; *Howard v. Patrick,* 43 Id. 121; *Johnson v. Disbrow,* 47 Id. 59.

3. The evidence regarding the sale by Reynolds to Miller of a feed-grinder was immaterial and irrelevant; citing *Vinton v. Peck,* 14 Mich. 286.

4. A witness cannot be impeached by contradiction upon matters not pertinent to the issue; citing *Dunn v. Dunn,* 11 Mich. 284; *Fisher v. Hood,* 14 Id. 189; *Hitchcock v. Burgett,* 38 Id. 501;

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Leavitt v. Stansell, 44 Id. 424; *Dalman v. Koning*, 54 Id. 320.

5. A writing, the genuineness of which is disputed, cannot be used on the cross-examination of a witness called as an expert on a question of handwriting, to test his accuracy; citing Rogers, Exp. Test. § 148; Lawson, Exp. Test. 413; *Howard v. Patrick*, 43 Mich. 122; *Tyler v. Todd*, 36 Conn. 222; *Bacon v. Williams*, 13 Gray, 525; *Van Wyck v. McIntosh*, 14 N. Y. 439; *Bank v. Mudgett*, 44 Id. 514.

6. The Court has uniformly held that the examination of experts on questions of handwriting should be confined to papers in issue, and not extend to other and unproved writings; citing *Vinton v. Peck*, 14 Mich. 286; *Van Sickle v. People*, 29 Id. 61; *In re Foster*, 34 Id. 20; *Bank v. Robert*, 41 Id. 709; *Howard v. Patrick*, 43 Id. 122; *People v. Gale*, 50 Id. 237.

7. The payee of a note may be a *bona fide* holder within the meaning of that term; citing *Outhwite v. Porter*, 13 Mich. 533.

8. Where novation occurs, and a note is given direct to the payee by the maker at the request of the intervening party, a failure of consideration between that party and the maker does not affect the payee, and he can recover; citing *Outhwite v. Porter*, 13 Mich. 533; *Iron Co. v. Brown*, 63 Me. 139; *Horn v. Fuller*, 6 N. H. 511; *Railroad Co. v. Chamberlin*, 44 Id. 494; *Adams v. Power*, 48 Miss. 450; *Harrod v. Black*, 1 Duv. (Ky.) 180; *Glascock v. Rand*, 14 Mo. 550; *Henry v. Ritenour*, 31 Ind. 136.

9. The holder of a note transferred to him before maturity in payment of an antecedent debt is deemed to have received it for value, in the usual course of trade; citing *Bostwick v. Dodge*, 1 Doug. 413; *Outhwite v. Porter*, 13 Mich. 533.

10. The circumstances of the inception of this note are not such as will prevent recovery by a *bona fide* holder, but the maxim that, when one of two innocent persons must suffer by the acts of a third, the loss must be borne by the person who enables such third person to occasion it, applies; citing *Burson v. Huntingdon*, 21 Mich. 415; *Gibbs v. Linabury*, 22 Id. 479; *McNamara v. Gargett*, 68 Id. 454; *Mace v. Kennedy*, Id. 389.

11. Evidence of notice to Reynolds should have been excluded from the consideration of the jury on proof that plaintiff was a *bona fide* holder; citing *Hunter v. Parsons*, 22 Mich. 96; *Miller v. Finley*, 26 Id. 249; *Polhemus v. Bank*, 27 Id. 44.

12. As to the weight to be given by the jury to the opinion of expert witnesses as to the genuineness of Miller's signature to the note, counsel cited *Vinton v. Peck*, 14 Mich. 286; *People v. Gale*, 50 Id. 237; *Van Sickle v. People*, 29 Id. 61; *In re Foster*,

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34 Id. 20; *Bank v. Robert*, 41 Id. 709; *Howard v. Patrick*, 43 Id. 122.

Samuel W. Burroughs, for defendant, contended:

1. A note void for illegality of consideration is not a sufficient consideration for a new note given instead thereof; citing *Comstock v. Draper*, 1 Mich. 481.
2. Under the facts, as disclosed in the record, plaintiff is not entitled to recover; citing *McNamara v. Gargett*, 68 Mich. 454.
3. Failure of consideration may always be shown in a suit on a contract, and in an action on negotiable paper proof may be made of the purpose for which it was given, or that the purpose does not require the enforcement of payment; citing *Maltz v. Fletcher*, 52 Mich. 484.
4. A *bona fide* purchaser, even, cannot recover on a note the signature to which was obtained by fraud and deceit without the fault of the person purporting to be the maker; citing *Bank v. Deal*, 55 Mich. 502; and where a bond is given with a note, parol evidence is admissible to show non-compliance with its conditions; citing *Bowker v. Johnson*, 17 Mich. 42.

MORSE, J. The plaintiff sued the defendant in *assumpsit* upon the following promissory note:

"$100. INKSTER, MICH., Nov. 28, 1885.

"On or before the first day of January, 1887, for value received, I, the undersigned, of the township of Taylor, county of Wayne, State of Michigan, promise to pay to the order of the Johnston Harvester Company, one hundred dollars ($100), payable at express office, Dearborn, Mich., with interest at seven per cent. per annum from Nov. 1, 1885, until due, and ten per cent. after due.

"JOSEPH MILLER.

"P. O. Address: Taylor, County, Wayne, State, Mich."

This note was indorsed as follows:

"For value received I hereby guarantee the prompt payment of the within note, and waive protest, demand, and notice of non-payment thereof.

"GEORGE REYNOLDS.

"Post-office: Inkster, Mich. Date, Dec. 17, 1885."

The defendant pleaded the general issue, and gave notice that the alleged note was without value and con-

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sideration, and that it was a forgery, and never executed by him. He also filed an affidavit, denying under oath its execution. Verdict and judgment in the court below for defendant.

Reynolds was the agent of plaintiff in selling machines, and acted as such agent under a written contract. One Samuel Clay, a farmer, was owing him $100. Clay had delivered oats under the usual Bohemian scheme to defendant, and held his note for $100. Clay said to Reynolds that if they could get defendant to take up his note, and give a new one to Reynolds, "it would clear them both."

Reynolds and Clay were the only witnesses for plaintiff. They testify that the note from defendant to Clay was written on an ordinary half sheet of white note paper, and Reynolds did not wish to take it, because his company (the plaintiff) would not receive a note in payment of Reynolds' indebtedness to them, unless it was written upon one of its blanks. They went together to Miller's house, and proposed the arrangement to him. He at once accepted the proposition, and executed and delivered, the note in suit to Reynolds. The Clay note was then delivered to defendant, and burned. Reynolds knew nothing of the consideration for the old note until after the new note was made and delivered to Reynolds. Then the defendant said that if the Bohemian Oats Company did what was right with him, he holding the usual bond, he would pay the new note, but if they did not he would not pay it.

Reynolds also testified that he never acquainted the plaintiff with this transaction, or the consideration of the note, but indorsed it a few days after its execution, and forwarded it to plaintiff in payment of a balance due from him to the company.

Miller testified in his own behalf that, in the fall of

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1885, one Riggs, an agent for a Bohemian Oats Company, contracted with him for the sale of 10 bushels of Bohemian oats, and gave him a bond, or contract, by which the said company agreed to purchase 20 bushels of the same kind of oats, to be raised from the seed so purchased by him; that, in pursuance of this contract, he gave the promissory note to Clay, who delivered the oats contracted for; that the company failed to fulfill the bond or contract on their part.

He further testified that Reynolds and Clay came to his house on the 28th day of November, 1885, and requested him to make a new note for the $100, payable to the order of Reynolds; that he did so, conditioned, however, with an oral understanding that unless the Bohemian Oats Company purchased the 20 bushels from him, as agreed in the bond, he would not pay the new note. But he testified further that the note in suit was not the note he then executed, and that he never made or signed any such note at that or any other time; that the note he made and delivered to Reynolds was not written upon a printed blank, but was upon an ordinary sheet of white letter-paper, and did not provide for the payment of any more than 7 per cent. interest before or after due.

The plaintiff, in opening his case, proved the execution of the note by the testimony of Reynolds. The court, against the objection of plaintiff's counsel, permitted a cross-examination of the witness, not only with reference to the execution of the note, but upon other matters pertinent to the claim of the defense. He was asked if he had not made certain statements to different persons to the effect that he knew the Clay note had been given for Bohemian oats when he received it, and before the exchange of notes was made. Then witnesses were permitted to testify in impeachment of his answers to such questions. It is claimed that by asking these questions

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the defendant made Reynolds his own witness, and was bound by his answers.

We think there was no error committed in this respect. Reynolds testified in chief that he was present with Clay at the house of Mr. Miller, and saw defendant sign the note, and that he was the agent of the plaintiff. The defendant was entitled, upon cross-examination, to everything that took place at the house on that occasion; and when, upon such cross-examination, the witness stated that he knew nothing about the consideration of the Clay note, or what it was given for, as he did testify, then the defendant was entitled to ask him if he had not made different statements out of court of what occurred there, and, if he denied making any such statements, to prove it when he was making his defense.

It is also assigned as error that the counsel for defendant was permitted to interrogate the witness Reynolds, and show by his own testimony that he had before this sold a grinder, or pulverizer, to the defendant, who paid him the price in cash,—$35; and that afterwards he turned in to a company at Ann Arbor a $35 note, purporting to be signed by the defendant, which was not given for the grinder; and that the grinder was the only implement he ever sold defendant, the price of which was $35. We think this evidence was admissible as affecting the credibility of the witness, who did not claim his privilege of not answering it, because it might tend to criminate him. It was also competent for another reason. It had some tendency to show that the witness obtained the note in this case fraudulently. See *Stubly v. Beachboard*, 68 Mich. 422 (36 N. W. Rep. 202, 203).

Two experts in handwriting, both of whom had never seen defendant write, were examined, and, from a comparison between the signature to the note in suit and signatures of Miller in the case admitted to be genuine,

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gave their opinion that the defendant signed the note. To test the value of their evidence, the counsel for the defense asked them to make comparisons between two signatures of the witness Reynolds in the case,—one admitted by him to be genuine, and the other claimed by him to have been written by another than himself, but by his authority and direction. One saw a very close similarity between the letters "yn" in the two signatures, while the other, not seeing this, insisted that the "lds" were very much alike. The object evidently was to show the fallibility and unreliable character of the testimony. The plaintiff's counsel insist that this was error, and invoke the rule that a writing, the genuineness of which is disputed, cannot be used to test his accuracy.

We do not think the rule applies in this instance. It was not claimed that one of these signatures was the genuine signature of Reynolds; but it was used, as not being his signature, in comparison with his admitted signature, for the express purpose of ascertaining what was the value of the opinions of these experts. We know of no rule prohibiting such a test, when the writings are properly in the case, as they were here. The sequel showed that the opinions of the experts were of but little worth, and we are not disposed to limit or confine the opportunities for testing and determining the accuracy and value of expert evidence. These men were testifying entirely from comparison, and it was competent by the comparison thus made upon cross-examination to show that they differed radically in their views of the similarity of letters, and that one as well as both might be easily mistaken in their assumptions from a comparison of signatures. The fact that the witnesses did not know whether the signatures were made by one man or two but added to the value of the test.

It was claimed upon the trial that the plaintiff was a

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good-faith holder of the note, and that it received the same in the usual course of business, in payment of an antecedent debt, from Reynolds. The agreement between the plaintiff and Reynolds, under which the latter acted as agent of the former, confined such agency to the sale of the plaintiff's machines, and the taking of orders for the same, and notes for the payment of those sold and delivered, which notes Reynolds was to guarantee. If the jury found that the note in suit was a forgery, as claimed by the defendant, of course the fact of the plaintiff's being a *bona fide* holder would make no difference.

But it was further contended by the defendant that in taking the note Reynolds was the agent of the company, and that the plaintiff was bound by his knowledge that it was given in payment of a Bohemian oat transaction.

The counsel for the plaintiff requested the court to instruct the jury that "the plaintiff's evidence being uncontradicted that the plaintiff is an innocent purchaser for a valuable consideration, and is the present owner of the note sued upon, and the note being unpaid, the only question left for" their consideration was whether or not the note was signed by the defendant,—whether it was his genuine note or not; and that they could not consider any evidence relative to the consideration of this note between Miller and Clay and Miller and Reynolds.

The court refused to so charge the jury, and instructed them in substance that if they believed the testimony on behalf of the defendant as to the circumstances attending the execution of the note, and that there was notice to Reynolds that the new note which he received (the note sued upon in this case) was given to take the place of an old note, which was given for Bohemian oats, then the defendant must prevail. In another part of the charge

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he left it to the jury to say whether or not, under the contract between the plaintiff and Reynolds, and the circumstances attending the procurement of the note he was the agent of the plaintiff in the taking of it. This is the main controversy in the case.

It seems to us that Reynolds, upon his own testimony, must be considered to have been acting as the agent of the company when he procured this note. It was made payable to the order of the plaintiff, and upon the company blanks. It is evident that they received it as a note taken by their agent, and sent it back to him to collect under their contract with him. He guaranteed it in compliance with the contract. He swears that he sent it to them in payment of his indebtedness to them, but it is plain they did not receive it in settlement with him. The contract under which he was employed stipulated:

"10. The second party further agrees to keep a correct account of all machines sold, separate and apart from his other accounts; to make all notes or drafts given for machines payable to the first party or its order; to keep said account-books, notes, or drafts subject to use and inspection of said first party, or its agent, attorney, or assigns; and to comply with the terms of sale above mentioned, unless otherwise authorized or instructed in writing to the contrary by said party of the first part.

"11. The second party further agrees to forward to the first party, at Chicago, Ill., so often as requested during the time of selling said machines, a report of sales showing the number of machines sold, the terms of sale, and, the number of machines unsold, and to remit with each report the money and notes received for machines sold up to that time; also to collect said notes free of charge, when returned to him for that purpose, and forward the money by express or by draft as directed by said first party."

No one appears on behalf of the plaintiff in this suit, except Reynolds, to testify how this note was received, or what the knowledge of the company was as to the

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circumstances of its inception. He was authorized to remit either in notes payable to the order of the company and guaranteed by him, or in money, for his sales. He claims he sent this note in lieu of money. He said nothing to plaintiff about it, however, but remitted it as he would a note taken on sale of a machine, and upon the same blanks. The company, under the contract, received it, then, as their note taken by their agent, and must take it with the same knowledge that the agent had. It is not necessary, therefore, to examine the question argued before us whether under any circumstances the payee of a note can be considered a good-faith holder for value as against the maker.

It is plain that Reynolds, in taking the note in suit upon the blanks of the plaintiff, and guaranteeing its payment, as he did notes received upon the sales of machines, acted as the agent of the company. The fact that he sold no machine to defendant does not alter the case. The note, by his act, was made the property of the company at its inception, so that when it was delivered to Reynolds it was delivered to him as the agent of the company. If he was not the agent when he procured it, he received it for the company as their agent. No other officer of the corporation had anything to do with the transaction by which this note became the property of the plaintiff. The company, therefore, must be bound by his acts and his knowledge, if they undertake to recover upon this note. If the taking of this note was not within the scope of Reynolds' agency under the contract, and the making of it upon the blanks of the company and to the order of plaintiff was a fraud upon them, they should, when this fact was ascertained, have repudiated it, and looked to Reynolds for the amount of it.

The plaintiff cannot ratify the fraud of Reynolds upon

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the defendant by accepting this note and suing upon it, and claim at the same time to be a good-faith holder of the note, because Reynolds did not acquaint the company of the circumstances under which he procured it when he sent it to them, but led them to suppose that it had been taken in the ordinary course of his agency under the contract.

The judgment is affirmed, with costs.

SHERWOOD, C. J., CHAMPLIN and CAMPBELL, JJ., concurred. LONG, J., did not sit.

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ROBERT T. MCNAUGHTON v. SAMUEL MARTIN.

Taxes—Law of 1885—Sale of lands assessed prior to passage of act—Constitutional law.

This case is ruled by *Humphrey v. Auditor General*, 70 Mich. 292, and *Hall v. Perry*, 72 Id. 202, in which it is held that sales for delinquent taxes assessed under the 1882 tax law could not be made under the law of 1885, which was prospective only in its operation.

Case made from Jackson. (Gridley, J.) Submitted on briefs June 15, 1888. Decided November 1, 1888.

Ejectment. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

James W. Blakely, for appellant.

Grove H. Wolcott, for defendant.

LONG, J. This is an action of ejectment brought in the circuit court for the county of Jackson. The cause

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was heard before the court without a jury, and the court found the following facts:

1. The plaintiff claims possession of the premises described in the declaration in this cause under and by virtue of a deed from the Auditor General of this State, executed by him on the 17th of November, 1886, upon a sale of the premises for delinquent taxes for the year 1882.

2. The defendant was in actual possession of the premises described in the declaration at the time of the assessment of said taxes for the year 1882, at the time of the execution of said deed, and also at the commencement of this suit.

3. The premises so deeded were sold under Act No. 153, entitled "An act to provide for the assessment of property, and the levy and collection of taxes thereon," approved June 9, 1885; the same being one of the public acts of the State of Michigan.

Upon which facts the said court did on the 31st day of December, 1887, file the following conclusion of law, to wit:

"The conclusion of law upon the foregoing finding of facts is that the plaintiff cannot recover, and that defendant is entitled to judgment of not guilty of withholding the possession of the premises mentioned in the declaration in this cause, and that he should recover his costs, to be taxed.

"G. T. GRIDLEY, Circuit Judge."

Exceptions were filed by the plaintiff to such findings, and judgment was thereafter entered in the cause for the defendant, in accordance with the findings, and plaintiff brings the case into this Court.

The trial court is correct in its conclusions of law. Substantially the same question was raised in *Humphrey v. Auditor General*, 70 Mich. 292 (38 N. W. Rep. 214), and again in *Hall v. Perry*, 72 Id. 202 (40 N. W. Rep. 324), in which it was held that sales for delinquent taxes assessed under the law of 1882 could not be made under

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the law of 1885, as the law of 1885 was not retroactive. The present case must be ruled by those cases.

The judgment of the court below must be affirmed, with costs.

The other Justices concurred.

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ERMINA L. HINES v. THE CITY OF CHARLOTTE.

Municipal corporations—Neglect of officers—Liability—Fire limits.

Municipal corporations, under their charters and ordinances, do not become insurers of the property within their corporate limits from destruction by reason of the neglect or refusal of their officers and agents to enforce their ordinances.[1]

So *held*, where the common council of a city established fire limits, and by ordinance prohibited the erection of wooden buildings therein, and was sued for damages sustained by reason of the burning of a wooden building erected within said limits with the full knowledge of the city authorities.

Error to Eaton. (Hooker, J.) Submitted on briefs June 15, 1888. Decided November 1, 1888.

Case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Foote & Shaull, for appellant, contended:

1. Municipal corporations partake of two characters, the one public and the other private. In the former they are regarded as agencies of the State, and entitled to the same immunities as the state itself. Legislative and judicial duties are of this class; citing *Rivers v. Augusta*, 65 Ga. 376; *Wheeler v. Cincinnati*, 19 Ohio St. 19; 2 Thomp. Neg. 734; and to this may be added matters of general and public concern; citing *Detroit v.*

[1] See *Amperse v. City of Kalamazoo*, 75 Mich. 228; *Amperse v. Winslow*, Id. 234.

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Blackeby, 21 Mich. 84; *Navasota v. Pearce*, 46 Tex. 526; 2 Thomp. Neg. 738; but here the immunity ends; citing *Commissioners v. Detroit*, 28 Mich. 238; *Bailey v. New York*, 3 Hill, 531; *Small v. Danville*, 51 Me. 362; *Philadelphia v. Fox*, 64 Penn. St. 180.

2. A municipal corporation in its private capacity, when the duty imposed is other than governmental, will be subjected to an action for a wrongful act, the same as a natural person, and for the same reason; citing *Burford v. Grand Rapids*, 53 Mich. 102; *McCombs v. Akron*, 15 Ohio, 480.
3. A natural person is liable for his misfeasance, his malfeasance, and his non-feasance, whether committed by himself or his agents; citing Addison, Torts, 23–33.
4. It is therefore a logical sequence, flowing from the combination of these two propositions, that a municipal corporation is liable for absolute and purely ministerial acts of a local nature, to be performed by it through its agents, its only mode of action; citing *Rivers v. Augusta*, 65 Ga. 376; *Goodrich v. Chicago*, 20 Ill. 445; *Griffin v. Mayor*, 9 N. Y. 459; *Lery v. Mayor*, 1 Sandf. 465; *Goodloe v. Cincinnati*, 4 Ohio, 500; *Little v. Madison*, 42 Wis. 643; *Storrs v. Utica*, 17 N. Y. 104; *Delmonico v. New York*, 1 Sandf. 222; *Erie City v. Schwingle*, 22 Penn. St. 384; *White Lead Co. v. Rochester*, 3 Comstock, 467; *McCombs v. Akron*, 15 Ohio, 476; *New York v. Furze*, 3 Hill, 613; Willcock, Mun. Corp. 30; 2 Thomp. Neg. 731.

Huggett & Smith, for defendant, contended:

1. In this State it is clearly settled that in chartering municipal corporations no contract relations are created; hence all that class of cases holding cities responsible for injuries to private individuals upon the theory of contract relations are not applicable to this case; citing *Detroit v. Blackeby*, 21 Mich. 84.
2. It is equally well settled that a city cannot be held responsible for injurious consequences resulting from an exercise of its legislative authority; citing *Burford v. Grand Rapids*, 53 Mich. 100, and cases cited; *Lansing v. Toolan*, 37 Id. 152; *Ashley v. Pt. Huron*, 35 Id. 286.
3. The plaintiff seems to base her whole claim upon the theory that it is the corporate duty of a municipality through its officers to insure an absolute observance of all of its by-laws and ordinances, and that a liability arises whenever such officers in a passive way neglect or omit to secure such observance. This is certainly not the law; citing *College v. Cleveland*, 12 Ohio St. 375; *Wheeler v. Cincinnati*, 19 Id. 19; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Weller v. Burlington*, 12 Atl. Rep. 215; *Hill v. Boston*, 122 Mass. 344, 357, and cases cited.

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4. It is only where corporations have been guilty of some positive mischief, produced by active misconduct, that they have been held liable, and not for mere non-feasance, or for errors of judgment; citing *Pennoyer v. Saginaw City*, 8 Mich. 534; *Detroit v. Corey*, 9 Id. 165; *Dermont v. Detroit*, 4 Id. 435; *Detroit v. Blackeby*, 21 Id. 84; *Pontiac v. Carter*, 32 Id. 164; *Detroit v. Beckman*, 34 Id. 125; *Ashley v. Pt. Huron*, 35 Id. 296; *Burford v. Grand Rapids*, 53 Id. 102; *Lansing v. Toolan*, 37 Id. 152; *Defer v. Detroit*, 67 Id. 346.

LONG, J. This is an action on the case, brought in the circuit court for the county of Eaton. The plaintiff claims in her declaration that the defendant, the city of Charlotte,—

"On March 29, 1871, was duly authorized and empowered by its charter,—said charter being an act of the Legislature of the State of Michigan, approved March 29, 1871,—among other things, by an action of the common council of said city, a majority of the members-elect concurring, to make all such by-laws and ordinances as it should deem necessary and proper to secure said city and the inhabitants thereof against injury by fire, and to prescribe fire limits within said city of Charlotte.

"And the said defendant, in pursuance of the power so granted by its charter as aforesaid, did on, to wit, September 3, 1873, by its common council, a majority of the members-elect concurring, at a regular meeting of said common council, duly make and pass an ordinance entitled 'An ordinance prescribing fire limits on blocks 23 and 24, in the city of Charlotte,' therein and thereby prohibiting the erection of any building without party or fire walls of brick or stone, and roof of metal or slate or composition, excepting only wooden buildings not more than eight feet square, and not to face upon any street, or less than thirty feet from the line thereof, within the limits in and by said ordinance prescribed; and placing adequate means in the hands of said city, and in the hands of its servants and officers, for the proper enforcement of the provisions thereof, and making it its absolute duty, through its servants and officers, to enforce the provisions thereof.

"Which said ordinance was duly amended on, to wit, May 6, 1881; and again, on, to wit, May 7, 1883, said ordinance was duly amended so as to include within its

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provisions blocks 18, 23, 24, 31, and 32, in the said city, which said ordinance, so amended as last aforesaid, contained all the provisions above recited, and also made it the absolute duty of the fire-warden of said city, and each and every member of the common council thereof, *ex officio*, in case any person should erect or place, or cause to be erected or placed, any building or parts of a building, contrary to the provisions of said ordinance, to notify said parties forthwith to remove the same, and to enforce all the provisions of said ordinance.

"And said ordinance further provided that no person should erect any building or part of a building on said blocks 18, 23, 24, 31, and 32, in said city, until he should have filed with the recorder of said city complete plans and specifications of said building or part of a building so proposed to be placed or erected, and until he had obtained from said city recorder a certificate in writing that the common council of said city had approved of said plans and specifications.

"And before and at the time of the passing of said ordinance by the common council of the said city of Charlotte, on, to wit, September 3, 1873, aforesaid, and before and at the time of the amendments to said ordinance, as aforesaid, so as to include within its provisions and operation said blocks 18, 23, 24, 31, and 32, aforesaid, in said city, said plaintiff owned and occupied as a store, workshop, and dwelling-house a certain building, lawfully constructed and built on lot 13 on block 32 in said city, of great value, to wit, of the value of $1,600, at the time of the several grievances next mentioned on the part of the said defendant; and the said building so constructed by the said plaintiff on said lot 13 on said block 32 in said city at the time of the several grievances hereinafter next mentioned on the part of the said defendant, then and there being, did contain goods, chattels, tools, furniture, and personal property, then and there belonging to and being the property of the said plaintiff, of great value, to wit, of the value of $2,000.

"Yet the said defendant, well knowing the premises, and while said ordinance and each and every provision thereof was of full force and effect in and over lot 17 and said lot 13, both being situated on said block 32, as well as all of said blocks aforesaid in said city, on, to wit, April 28, 1884, did receive information, and had written notice, by and through its common council,

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assembled and being called together in its official capacity, that one Frank Ruggles, of said city, wrongfully intended and proposed the violation of the provisions of said ordinance, in this, to wit: He proposed and suggested to said common council then and there that he intended and expected to violate said ordinance and the provisions therof by erecting a wooden building on lot 17 on said block 32 in said city, without filing the plans and specifications thereof with the recorder of said city, in and by the provisions of said ordinance provided as aforesaid, and by the wrongful and illegal construction of said wooden building, which said building, so wrongfully and illegally proposed to be constructed by said Ruggles, being more than 8 feet square, with wooden party or fire walls, and roof of wood, on said lot 17 on said block 32 in said city, and contiguous to the said building of the said plaintiff on lot 13 of said block 32 in said city, as aforesaid.

"Yet the said defendant did wrongfully and negligently allow and permit the said Frank Ruggles to construct said wooden building, to be used as a workshop, on lot 17 on block 32 in said city, as aforesaid, without filing plans and specifications thereof with the recorder of said city, and without party or fire walls of brick or stone, or roof of metal or slate or composition, and did wrongfully and negligently allow said wooden building, so constructed in violation of said ordinance, to stand and remain unmolested; and the said wooden building, wrongfully constructed and maintained by and with the permission and consent of the said defendant, on, to wit, the 17th day of October, 1885, and while said ordinance and each and every provision thereof was of full force and virtue, did catch fire, and by reason of the material used in its construction, and being constructed with walls and roof of wood, as aforesaid, said building, so wrongfully constructed and maintained by and with the knowledge and consent of the said defendant, did communicate fire and flames to the said building of the said plaintiff, on lot 13 of said block 32 in said city, whereby it, together with the said goods, tools, furniture, and personal property of the said plaintiff, then and there so situated and being therein as aforesaid, were utterly and wholly consumed and destroyed, to the damage of the plaintiff," etc.

A demurrer was interposed by the defendant, and the

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court below entered judgment in favor of the defendant. Plaintiff brings the case into this Court by writ of error.

The only question arising upon the record is: Does the declaration state a cause of action upon which the plaintiff is entitled to recover? We think not, and that the circuit judge was correct in entering judgment for defendant. Unless there be a valid contract creating, or a statute declaring, the liability, a municipal corporation is not bound to provide for and secure a perfect execution of its by-laws, and it is not responsible in a civil action for the neglect of duty on the part of its officers in respect to their enforcement, though such neglect results in injuries to private persons, which would otherwise not have happened.

The grievance alleged in the declaration is that the defendant, having power under its charter to pass ordinances fixing fire limits, and to fix and determine the character of the buildings within such limits, and defendant having by ordinance fixed the same, and determined the character of the buildings to be thereafter erected within such limits, its failure to enforce such ordinances resulted in the destruction of plaintiff's premises by fire.

Legislative power, whether held by the law-making authority of the State or by municipal bodies, is, in its nature, governmental and discretionary, and as a general rule a right of action as for a tort will not arise from any exercise of discretion in respect to it, or from failure to exercise such discretion.

In the case of *Forsyth v. Atlanta*, 45 Ga. 152, the city was held not liable for licensing the construction of a wooden building within its fire limits, from the erection of which, as the plaintiff averred, his own building took fire and was burned.

Municipal officers are in no such sense municipal agents that their negligence is the neglect of the municipality.

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It is true, if the act which is done by a municipal corporation would be tortious if done by a natural person, the corporation is held liable for it to the same extent, and for the same reason, that the natural person would have been. Here the complaint is that the defendant neglected and refused to act after having full knowledge that Ruggles proposed to erect a wooden building within the fire limits fixed by the ordinances of the city.

The rule is well established, however, not only in this State, but in most of the states, that simply as municipal corporations, apart from any contract theory, no public bodies can be made responsible for official neglect involving no active misfeasance. It is only where corporations have been guilty of some positive mischief produced by active misconduct that they have been held liable, and not from mere non-feasance, or for errors of judgment. Municipal corporations, under their charters and ordinances, do not become insurers of the property within their corporate limits from destruction by reason of the neglect or refusal of their officers and agents to enforce their ordinances.

Under the facts stated in the declaration, clearly the plaintiff cannot recover. *Village of St. Johns v. McFarlan*, 33 Mich. 72.

The judgment of the court below must be affirmed, with costs.

The other Justices concurred.

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THERESE THEISEN v. JOHN JOHNS.

Liquor traffic—Sale to minor—Action by parent—Damages—Jury—Challenge for cause.

1. In a suit involving the alleged *illegal* sale of liquor, a juror is subject to challenge for cause who swears on his *voir dire* that he has a prejudice against the sale of liquor.
2. One who believes that "a minor is as able to buy a glass of beer as a man of forty," and confesses in the jury-box that he is not in favor of enforcing the law prohibiting such first-named sale, is not a proper juror in a case involving the alleged violation of said law, although upon inquiry by the court he states that he thinks he can render a verdict in accordance with the law and evidence.
3. The peremptory challenge of a juror, after a challenge for cause has been erroneously overruled, will not cure the error where it appears that the party so challenging exhausted his peremptory challenges, as he may have been thereby obliged to retain a juror whom he would otherwise have excused.
4. Fairness to parties litigant demands that the jury should be free from bias and prejudice in all cases, and that they enter upon the trial with a single desire and purpose of doing equal and exact justice between the parties, and that according to the law and the evidence given them in open court; and when a juror confesses himself prejudiced against the enforcement of the law or against the party, he is not a fair juror, and should not be permitted to sit in judgment upon the rights of others who are seeking redress under and according to law. *Monaghan v. Ins. Co.*, 53 Mich. 246.
5. A sale of liquor to a minor under the age of 18 years gives a right of action for damages under Act No. 92, Laws of 1877, which cannot be lessened by the fact of sales by others to the minor, and proof of such sales is inadmissible in such a case.
6. In a suit under Act No. 92, Laws of 1877, to recover damages for the sale of liquor to a minor under the age of 18 years, proof of such sale entitles the plaintiff to $50 actual damages at least, and to such exemplary damages as the jury see fit to award under all of the circumstances of the case, not exceeding the amount claimed in the declaration.

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Error to Wayne. (Brevoort, J.) Argued June 21, 1888. Decided November 1, 1888.

Case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

James H. Pound (C. J. Lowrie, of counsel), for appellant.

Charles Flowers, for defendant.

LONG, J. This is an action on the case, brought in the circuit court for the county of Wayne, under sections 2268 and 2269 of Howell's Statutes, being Act No. 92 of the Public Acts of 1877 of the State of Michigan, which provides—

"That every person who shall by himself, or by any clerk, servant, agent, or employé, sell, give, or furnish, or cause to be sold, given, or furnished, any intoxicating, spirituous, malt, brewed, or fermented liquors, cider or wine, or any liquor or beverage any part of which is intoxicating, spirituous, malt, brewed, or fermented, to any minor under the age of 18 years, and every person who shall by himself, or by his clerk, servant, agent, or employé, permit or allow any such liquor, cider, wine, or beverage to be sold, furnished, or given to, or to be drank by, any such minor in his or her store, shop, saloon, restaurant, bar-room, or place of business where such liquors or beverages are kept, furnished, or sold, shall be liable for both actual and exemplary damages therefor, to the father, mother, guardian, or master, or any person standing in place of a parent to such minor, in such sum not less than $50 in each case, as the court or jury shall determine."

Section 2269. "The damages in all cases provided for in this act, together with the costs of suit, shall be recoverable in an action of trespass on the case before any court of competent jurisdiction. And in any case where parents shall be entitled to such damages, either the father or the mother may sue alone therefor; but recovery by one of said parties shall be a bar to a suit brought by the other."

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The declaration alleges that on the first day of May, 1885, said defendant was engaged in the business of selling at retail in the city of Detroit, in said county of Wayne, malt, brewed, and fermented liquors, to wit, lager beer, wine, ale, and spirituous and intoxicating liquors, to wit, whisky, brandy, gin, and rum, and that said defendant has continued in said business of selling at retail malt, brewed, and fermented liquors, and spirituous and intoxicating liquors, from thence hitherto.

That on the 26th day of February, 1887, defendant sold, gave, and furnished, and caused to be sold, given to, and furnished, intoxicating, spirituous, malt, brewed, and fermented liquors, to wit, whisky, brandy, gin, wine, and lager beer, to Frank Theisen; said Frank Theisen, being the son and child of the plaintiff, and a minor under the age of 18, to wit, of the age of 15, years, to the plaintiff's damage $500.

That the defendant on the said 1st day of May, 1885, and on divers other times between that day and the commencement of this suit, at the city of Detroit aforesaid, has sold, given to, and furnished, and has caused to be sold, given to, and furnished, intoxicating, spirituous, malt, brewed, and fermented liquors, to wit, whisky, brandy, gin, wine, and beer, to Frank Theisen; he, said Frank Theisen, being the son and child of plaintiff, and a minor under the age of 18 years, to wit, of the age of 15 years.

That the defendant on said 1st day of May, 1885, and on divers other times between that day and the commencement of this suit, at the city of Detroit, has sold, given, and furnished, and has caused to be sold, given, and furnished, intoxicating, spirituous, malt, brewed, and fermented liquors, to wit, whisky, brandy, gin, and lager beer, to Albert Theisen; he, the said Albert Theisen, being also a son and child of the plaintiff, and a minor

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under the age of 18, to wit, of the age of 16, years, to the plaintiff's damage of $500.

And that the defendant on the said 1st day of May, 1885, and on divers other times between that day and the 1st day of October, 1886, at the city of Detroit aforesaid, sold, gave, and furnished, and caused to be sold, given, and furnished, intoxicating, spirituous, malt, brewed, and fermented liquors, to wit, whisky, gin, brandy, and lager beer, to George Theisen; he, the said George Theisen, being also a son and child of the plaintiff, and at the time of furnishing to him by the defendant of the intoxicating liquors as aforesaid a minor under the age of 18, to wit, of the age of 17 years, to the plaintiff's damage of $500, etc.

And that the defendant is not and has not been since the 1st day of May, 1885, aforesaid, engaged in the business of a druggist.

And that by reason of the giving, selling, and furnishing to her said children, Frank Theisen, Albert Theisen, and George Theisen, by the defendant, of the intoxicating, spirituous, malt, brewed, and fermented liquors as heretofore alleged, she, the said plaintiff, has been deprived of the earnings of her said children, to wit, $1,000; and the said plaintiff has also been deprived of the labor and assistance of her said children, of the value, to wit, $1,000.

And that said plaintiff has been caused great shame, mortification, and disgrace on account of the forming by her said children of intemperate habits, caused by the furnishing to them, said children of plaintiff, by the defendant, of the intoxicating liquors as hereinbefore alleged, to her great damage, to wit, $1,000; whereby the plaintiff claims that by virtue of the provisions of sections 2268 and 2269 of Howell's Statutes of the State of Michigan, being Act No. 92 of the Public Acts of 1877

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of the State of Michigan, an action has accrued to her to recover the damages hereinbefore alleged, and all other damages, to wit, $5,000, etc.

The plaintiff recovered verdict and judgment for the sum of $100, and removes the case to this Court by writ of error.

The plaintiff's first two assignments of error relate to her objections, made during the time of the impaneling of the jury for the trial of the cause. The jury were sworn on their *voir dire*, and the following question asked of the juryman August Lemmer:

"Have you any conscientious scruples against the enforcement of the law relating to the sale of liquor to minors?

"*A.* I think a minor is as able to buy a glass of beer or whisky as a man forty years old. I don't think it is a good law, and I am not in favor of it."

Plaintiff's counsel challenged the juror for cause, on the ground that he was unfavorable to the enforcement of the law. The juror, in reply to a question by the court, said he thought he could render a verdict in accordance with the law and evidence. The challenge was not allowed by the court, and the plaintiff excepted.

The following questions were put to the juror Francis Rozier:

"*Q.* Are you in favor of enforcing the liquor law?

"*A.* No, not exactly.

"*By the Court.* What do you mean by that?

"*A.* I mean that I do not like the way they are being enforced now.

"*By the Court.* The question is, what do you mean by 'enforcing the law?' This is an action brought to recover damages for the sale of liquors to a minor. Do you believe that your prejudices are so strong that you cannot render a verdict according to the testimony and law?

"*A.* Not in this case.

"*By the Court.* That is a very strange statement for a juror to make. What do you mean by that?

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"*A.* I think they should go according to law, if it was a minor.

"*Q.* If it were a grown person you would not go according to law?

"*A.* Yes, sir.

"*By Plaintiff's Counsel.* I challenge the juror for cause.

"*The Court.* This is rather an extraordinary statement for a juror to make. I suppose every man feels himself bound to follow the law, whether good or bad. It is not for us to complain of the law. If the people are not satisfied with it, they have a right to have it changed. You are, as I understand, prejudiced against the law, but you think you could render a verdict according to the evidence and law given you in this case. Is that it?

"*A.* Yes, sir."

The court thereupon refused to allow the challenge for cause, and plaintiff excepted.

When Mr. Drouillard, a juror, was asked by defendant's counsel: "Are you in favor of the stringent prohibitory laws?" the question was objected to as immaterial and incompetent. The objection was overruled, and plaintiff excepted. Witness was then asked by counsel for defendant: "Have you any prejudice against the sale of liquor?" Same objection, ruling, and exception. The juror answered that he had. The court properly permitted these questions to be answered by the juror, and, if defendant's counsel had insisted upon his challenge for cause, the court should have allowed such challenge, and excused the juror. There is no error in the ruling of the court in permitting such an examination.

Both plaintiff and defendant exhausted their peremptory challenges. The juror Lemmer was challenged by the plaintiff peremptorily. The jury was then sworn, being composed of the juror Rozier, heretofore referred to, and others. The plaintiff should have been allowed her chal-

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lenge for cause as to the juror August Lemmer. His answer to the questions propounded to him by counsel showed very clearly his prejudice against the law and the case on trial. One who believes that "a minor is as able to buy a glass of beer or whisky as a man of forty," and who confesses in the jury-box that he is not in favor of enforcing the law, is not a proper juror, although upon inquiry by the court he stated that he thought he could render a verdict in accordance with the law and evidence. Parties are entitled to have their cases in courts of justice tried before jurors who will hear, try, and determine them according to the law and the evidence given them in open court, and not by men who do not believe in the law and its enforcement. Fortunately for the public such a man as this juror shows himself to be cannot be allowed to sit in judgment on his fellows, or to take into his keeping in the jury-box the fortunes of other men. The court should have excused him when challenged by counsel for cause. It will not do to say that this error was cured by the fact that counsel afterwards challenged the jury peremptorily, as it appears from the record that counsel upon both sides exhausted their peremptory challenges. There may have been others upon the jury whom counsel might desire to challenge peremptorily, and have been unable to excuse by reason of having exhausted his challenges.

The juror Francis Rozier should have also been excused when challenged for cause. He was not exactly in favor of enforcing the law, although he thought they should go according to law if it was a minor. He confesses a prejudice against the law, though he thought he could render a verdict according to the law and evidence. With such a juror in the box, the plaintiff at the outset must overcome this prejudice before she could have her case fairly and conscientiously considered. The party is put to a

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disadvantage in the trial of his case with such jurors, and courts should not compel parties to resort to and exhaust their peremptory challenges on such jurors. Fairness to parties litigant demands that the jury should be free from bias and prejudice in all cases, and that they enter upon the trial of the cases with the single desire and purpose of doing equal and exact justice between the parties, and that according to the law and the evidence given them in open court; and when a juror confesses himself prejudiced against the enforcement of the law or the party, he is not a fair juror, and should not be permitted to sit in judgment upon the rights of others who are seeking redress under and according to law. *Monaghan v. Ins. Co.*, 53 Mich. 246 (18 N. W. Rep. 797).

Testimony was given on behalf of the plaintiff tending to prove the facts alleged in the declaration. The defendant controverted these facts, and the whole case was submitted to the jury under a very fair charge from the court. The minors were examined as witnesses by plaintiff, and on direct examination by plaintiff's counsel testified that they had not drank at any other place than that of defendant. Testimony was offered by defendant, and received by the court under objection of plaintiff's counsel, tending to show that they had drank at other places. This testimony was incompetent, and should have been excluded. It was not competent for plaintiff to prove that these minors had not drank at other places. That was wholly immaterial, and, had defendant made objection to its introduction, it should have been excluded. We do not think that damages under this statute can be lessened or enhanced from the fact that a minor may have drank at other places, nor can the liability be apportioned merely because the injury was due in part to the acts of others than the defendant. This was the view held by this Court in *Steele v. Thompson*, 42 Mich.

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596 (4 N. W. Rep. 536), in which Mr. Justice GRAVES, delivering the opinion of the Court, says:

"Now, the statute we are considering proceeds upon the idea that there has been an injury which the defendant, by some of the means indicated, has contributed to produce, and that he shall be liable for the whole injury, and not merely for such portion as a jury, if able to agree upon any scale of apportionment, may assign as his actual share or quota."

And we are of the opinion that under this statute it is immaterial whether others had made sales to the minors or not. If the defendant made sales to them, and they were under the age of 18 years, it was a violation of the statute, and gave the plaintiff a right of action for damages, and these damages could not be lessened by the fact of sales made by others.

The only remaining question which we need to discuss arises upon the charge of the court. It is claimed by plaintiff's counsel that the statute is to be construed as fixing the amount of recovery at $50 for each sale. The court construed it as meaning for each trial. It is evident that "in each case" means in each particular instance or cause. The word "case," as used in this statute, is synonymous with cause. It cannot be said that the Legislature, in fixing the minimum of the recovery to be had for the violation of this statute, intended to make the penalty for each sale the sum of $50. That this is the true construction of these words is evident from the language employed in the section following:

"Damages in all cases provided for in this act, together with the costs of suit, shall be recovered in an action of trespass on the case before any court of competent jurisdiction."

That is, where the claim for damages alleged in the declaration shall bring the case within the jurisdiction of a court of record, if the plaintiff is entitled to recover

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at all, he shall at least recover a minimum amount fixed by the statute, and, in addition thereto, his costs of suit. If the construction contended for by plaintiff's counsel was to be given to this statute, then the jury would have no other duty to perform, in ascertaining actual damages, except to multiply the number of sales made by the penalty fixed by the statute. It is evident the Legislature intended that, in prosecutions for damages under this statute, if the jury found liquors had been furnished to a minor under the age of 18 years, in violation of the act, then the plaintiff might recover the penalty, which should in no case be less than $50 for actual damages, and such exemplary damages as the jury might find under all the circumstances of the case. It might appear by the evidence given that the plaintiff had suffered a much larger amount in actual damages than $50, and this the jury could give, up to the amount claimed in the declaration, if, under the circumstances of the case, the facts of the case warranted it, and the plaintiff had sustained actual damages to that amount, together with such exemplary damages as they might find were warranted by the circumstances of the case.

For the errors pointed out the judgment of the court below must be reversed, with costs, and a new trial ordered.

SHERWOOD, C. J., CHAMPLIN and MORSE JJ., concurred. CAMPBELL, J., concurred in the result.

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CHARLES H. PLUMMER v. FREDERICK A. KENNEDY ET AL.

Public buildings—Bond for protection of laborers and material-men—Neglect of officers—Counties—Board of supervisors—Erection of poor-house.

1. The board of supervisors of a county have *exclusive* authority over the subject of the erection of houses for the reception of the poor of their county, and in its exercise may employ such agents as they choose to execute what they have determined to do.
2. Members of a board of supervisors, appointed by the board to act as a committee in conjunction with the superintendents of the poor to let a contract for rebuilding a county poor-house, and who let said contract in behalf of the county, are agents of the board within the intent and spirit of section 1 of Act No. 45, Laws of 1885, requiring in such cases the execution of a bond by the contractor for the payment of labor and materials.
3. Act No. 94, Laws of 1883, making it the duty of officers who contract for the erection of public buildings to require security from the contractor for the payment of labor and materials, is held constitutional by a majority of the Court.[1]

Error to Jackson. (Gridley, J.) Argued June 22, 1888. Decided November 1, 1888.

Case. Defendants bring error. Affirmed. The facts are stated in the opinion.

Eugene Pringle, for appellants Kennedy and Anderson, contended:

1. The board of superintendents of the poor is a statutory board, and its powers, as also those of its members, are defined by statute; citing How. Stat. §§ 1756–1812; and their power in regard to the erection of poor-houses is limited to the case of their first erection, and when it is done by the express order

[1] See *Owen v. Hill,* 67 Mich. 43, for a discussion by Mr. Justice CHAMPLIN of the provisions of this statute. See, also, *Avery v. Supervisors,* 71 Mich. 538.

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of the board of supervisors; citing How. Stat. §§ 1759 (subd. 1), 1760, 1761.

2. If any suit is maintainable, it should have been against the board of supervisors, and not the defendants; citing *Bartlett v. Crozier*, 17 Johns. 429.

3. The superintendents of the poor are a corporation, and if liable for neglect of duty the action should be against the corporation, and not the individual members; citing 7 South L. Rev. 40, and cases cited; and it has been held that want of funds is no defense where the power to raise them belongs to the board, but that the rule is different where a single officer is to be charged personally; citing *Smith v. Wright*, 27 Barb. 627.

4. The power to act for the county in this case was vested exclusively in the board of supervisors, and it is doubtful whether the Legislature could confer it upon any other board or officer; citing Art. 4, § 38, Const.; *Allor v. Auditors*, 43 Mich. 76; *Letters of Judges to Governor*, Id. 641; and the board of officers or agents referred to in this act of 1883 must under it be necessarily the board of one of the political entities named, and not the mere ministerial agency of an authorized board.

Hammond, Barkworth & Cobb, for appellants Watts and Berry, contended as stated in the opinion.

Thomas A. Wilson, for plaintiff, contended:

1. A public officer having ministerial duties to perform, in which a private individual has a special and direct interest, is liable to such individual for any injury sustained by him in consequence of a failure to perform such duties, and honest intention will not excuse him; citing *Raynsford v. Phelps*, 43 Mich. 344; *Owen v. Hill*, 67 Mich. 43; *Robinson v. Chamberlain*, 34 N. Y. 389.

2. It can make no difference that the plaintiff had no interest at the time the defendants violated their duty, it being a continuing wrong, and it is sufficient that he shall at any time become one of the class to whom the duty is owing; citing *Adsit v. Brady*, 4 Hill, 630; *Robinson v. Chamberlain*, 34 N. Y. 389; *Hover v. Barkhoof*, 44 Id. 113; *Hayes v. Porter*, 22 Me. 371.

CHAMPLIN, J. This is an action on the case by the plaintiff, as a material-man, against Kennedy and Anderson, as superintendents of the poor, and Berry and Watts, as members of a committee of the board of supervisors of

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Jackson county, acting with the superintendents of the poor in the construction of a county-house, to recover for materials furnished to the contractors. The right of action is claimed under Act No. 94, Laws of 1883, as amended by Act No. 45, Laws of 1885, for the neglect of the persons above named to require a bond from the contractor for the protection of laborers and material-men, as provided by the act.

Anderson and Kennedy are alleged in the declaration to be the superintendents of the poor of Jackson county, and one Horatio S. Smith was averred to be the other member of the board. The declaration also avers that Berry and Watts were members of the board of supervisors of said county; that the superintendents of the poor were, by a resolution adopted by the board of supervisors, together with a committee thereafter to be appointed and selected from the members of the board, duly authorized, empowered, and directed to let the rebuilding of a county-house by contract to the lowest bidder, to be constructed under the supervision of a competent architect, with the advice and consent of said superintendents of the poor, and said committee so to be appointed by the said board of supervisors from the members thereof, or of such member thereof as the said board might thereafter designate.

That afterwards the board of supervisors appointed as such committee George Berry, John W. Watts, and William H. Adams, each being a member of said board of supervisors, to act as an advisory committee to co-operate with said superintendents of the poor in the proposed construction of the said county-house; that afterwards defendants Kennedy and Anderson, acting for and in the name of the superintendents of the poor, and Berry and Watts acting for and in the name of said advisory committee, entered into a contract, in behalf of said county of Jackson, with the firm of W. H. Myers & Son, of

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Hillsdale, Mich., for the furnishing of materials for and the construction of a certain building, to be known as the "County Poor-house," of the county of Jackson, which contract provided that the firm of W. H. Myers & Son should erect and complete the brick and carpenter work to be done on said building, and furnish material necessary therefor, the same being a public building, and to be built at the expense of the county of Jackson, upon the farm known as the "County Farm," which was then and there the property of said county, and situated in the township of Blackman, in said county; and that the said William H. Myers & Son, in pursuance thereof, entered into the performance of such contract.

The declaration then avers the duty of defendants to require sufficient security by bond for the payment by the contractors for all material and labor furnished to and performed for them in the erection and repair of the building mentioned in the contract, as required by said public law above referred to; that plaintiff after the execution of the contract as aforesaid, entered into a contract with William H. Myers & Son to furnish certain materials to be used in the construction of the building, and did furnish the same, which were so used, to the value of $986, which W. H. Myers & Son agreed to pay plaintiff therefor; that the contractors never completed the building under their contract, but failed, and were pecuniarily unable to do so, and the same was taken off their hands by defendants, and completed by them; that William H. Myers & Son owed said plaintiff $986 for the material so furnished and used, but became, were, and are wholly irresponsible, so that the said debt cannot be collected of them, or either of them.

The declaration then avers as follows:

"And for that, whereas, also, the said defendants, in disregard of their duty aforesaid, negligently and carelessly,

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and in disregard of the rights of this plaintiff, neglected to require of said contractors, W. H. Myers & Son, the bond aforesaid, and permitted the said firm of Myers & Son to take and enter into said contract for the construction of said county building, and to enter upon the performance thereof, without giving security, by bond or otherwise, for the payment of said contract for the labor and material furnished them, as required by said statute, and in consequence whereof there is now no fund to which the said plaintiff can resort for the collection of his said debt; whereby and by reason of said conduct and neglect of duty of the said defendants, and the provisions of the said statute, an action hath accrued to the said plaintiff to recover of the said defendants the said sum of nine hundred and eighty-six dollars, with interest thereon from, to wit, the 1st day of September, A. D. 1886, to the plaintiff's damage two thousand dollars. Therefore he brings suit."

Berry and Watts demurred generally, without specifying any cause. Kennedy and Anderson demurred, and specified the following causes:

"1. That it does not appear by the plaintiff's declaration, either—

"*a*—That the defendants were acting in their individual capacity; or—

"*b*—That they had power to bind their county by contract; or—

"*c*—That they had authority, as individuals, to prescribe the amount, approve the sureties, or have in custody any bond given as security for the benefit of laborers or material-men; or—

"*d*—That the plaintiff, in making sales of material, relied upon the defendants; or—

"*e*—That the defendants had or have moneys of said county subject to their order and control.

"2. That it does appear by said declaration—

"*a*—That the actings or doings of the defendants in the premises were wholly and only as members of the corporation of the superintendents of the poor of the county of Jackson.

"*b*—That the only board competent to act in the premises was the board of supervisors of the county of Jackson.

"*c*—That the claim of the plaintiff rests wholly upon a statute by which it was attempted to legislate for other purposes, and dif-

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ferent purposes, than those expressed in its title, and which is therefore unconstitutional and void.

"3. That the said declaration in other respects is uncertain, informal, and insufficient."

Joinders in demurrer were filed, and the court below overruled the demurrers, with leave to plead.

It is urged, in behalf of the demurrer of Berry and Watts, that they were not officers contracting on behalf of the county; that they had no such power, and could not by their signatures add anything to the validity of the contract; that the powers of the committee were in no sense contracting powers, but merely advisory; that it does not appear to have been the intention of the board of supervisors, by the resolution appointing the advisory committee, to do anything more than to assist the board of superintendents of the poor, in the work supposed to be properly theirs, by advice and counsel.

The board of supervisors of the county have exclusive authority over the subject of the erection of houses for the reception of the poor of their county, and in the exercise of this authority they may employ such agents as they choose to execute what they have determined upon to do. I think it sufficiently appears from the declaration that the defendants were duly authorized to act as agents of the board, and are directly within the letter and spirit of section 1 of Act No. 45, Laws of 1885. They were authorized and directed to let the contract to the lowest responsible bidder, and they entered into a contract for and on behalf of Jackson county. The county has recognized, and not repudiated, the contract, and the question of want of legal authority to bind the county does not arise in this action.

If it should be held that the agents employed might neglect the duty imposed by the statute, and then escape liability by setting up a want of authority, the statute

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might be easily evaded, and its protection to those relying upon the good faith of the transaction be entirely lost.

I have been unable to discover any constitutional objection to the statute, nor any difficulty to its enforcement.

It would be needless for me to review the several provisions of the statute, as the opinion expressed by me in *Owen v. Hill*, 67 Mich. 43 (34 N. W. Rep. 652), remains unchanged.

I think that the judgment of the circuit court should be affirmed.

SHERWOOD, C. J., and LONG, J., concurred with CHAMPLIN, J.

CAMPBELL, J. I do not think defendants are liable for the neglect charged.

MORSE, J., concurred with CAMPBELL, J.

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EDWARD SWEENEY v. ELIJAH J. DEVENS.

Fraud—Charge to jury.

The language used in that portion of the charge of the court quoted in the opinion is held to have been misleading, and to have given the jury the impression that the language of the request repeated in the charge was adopted by the court, and that they were instructed that everything should be so clear and conclusive as to leave no rational doubt in their minds as to the existence of the fraud charged.

Error to Wayne. (Brevoort, J.) Argued June 22, 1888. Decided November 1, 1888.

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Case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Edwin F. Conely, for appellant, contended:

1. The rule stated in the request, which was extracted from the opinion in *Buck v. Sherman*, 2 Doug. 182, was considered and rejected in *Watkins v. Wallace*, 19 Mich. 77, this Court holding in the latter case that the rule of mere preponderance applies to all civil actions; citing, also, *Elliott v. Van Buren*, 33 Mich. 49; *Peoples v. Evening News*, 51 Id. 12; *Monaghan v. Ins. Co.*, 53 Id. 238.

Geo. M. Collier, for defendant, contended as stated in the opinion.

LONG, J. This is an action on the case, brought in the circuit court for Wayne county. Verdict and judgment for the defendant, and plaintiff brings the case into this Court by writ of error. The action was for false and fraudulent representations, by which it is claimed defendant obtained from plaintiff $739 in money. The only error assigned is based upon the charge of the court.

The language complained of is contained in the following portion of the charge:

"It is the duty of the plaintiff, gentlemen, in all civil cases, to satisfy you by a preponderance of evidence—that is, by such evidence as carries with it conviction—that he has made a case before he can recover. In this particular case the plaintiff claims that by the fraudulent representations made to him by the defendant, Devens, he was induced to furnish Devens the sum of about $739, that said defendant used for his own benefit.

"Now, gentlemen, going into the sale of the patented article, as the one in controversy here, to wit, a patented fence-post, was perfectly legitimate. They had a right to do so. They had a right to put in such sums of money as they thought proper; and the whole thing turns here. As I have said before, this action is brought to recover the sum of money alleged to

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have been advanced by the plaintiff to said defendant by means of false and fraudulent representations.

"The instructions asked to be given on the part of defendant are substantially as follows: That fraud will not be presumed under slight circumstances. Everything should be so clear and conclusive as to leave no rational doubt in your minds as to its existence.

"Now, gentlemen, the rule is that fraud must be clearly proven, not by lightly inferring it, and that the party affected by it must complain promptly when the facts come to his knowledge. If you find, as a matter of fact, that the plaintiff did not at all rely upon the representations, either because he did not believe them, or because he chose to investigate, and act upon his own judgment, and, in pursuance of that, plaintiff went with the defendant to Chicago on the first trip of their enterprise, then this action cannot be maintained, and your verdict should be for the defendant."

The particular paragraph of this portion of the charge of which complaint is made, reads:

"That fraud will not be presumed under slight circumstances. Everything should be so clear and conclusive as to leave no rational doubt in your minds as to its existence."

It is contended by the counsel for defendant that the court, after laying down the rule correctly, simply repeated a request asked by defendant's counsel, and then proceeded to explain fully and correctly the law governing the case, and to which no exception was taken; and that the plaintiff has no right to complain, or to have the case reversed upon the isolated remark of the trial judge in repeating the request asked to be given by the defendant's counsel. I have carefully read the entire charge of the court, and can arrive at no other conclusion than that the language used in this part of the charge was misleading, and gave the jury the impression that the language of the request repeated in the charge was adopted by the court, and that they were instructed that—

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"Everything should be so clear and conclusive as to leave no rational doubt in their minds as to its existence."

The rule governing civil cases is laid down in *Watkins v. Wallace*, 19 Mich. 57, and in many other cases in this Court, and need not be stated here. I think the plaintiff's case was prejudiced by this language.

The judgment of the court below must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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MARY E. QUINNIN v. SAMUEL J. BROWN ET AL.

Mortgage—Assignment of interest therein—Priority of claims.

In this case it is held, upon the facts stated in the opinion, that an assignee of a $4,800 interest in a mortgage is entitled to have said claim first satisfied, on foreclosure, as between the assignor and assignee.

Cross-appeals from Shiawassee. (Newton, J.) Argued June 26, 1888. Decided November 1, 1888.

Foreclosure bill. Decree modified so as to give complainant's claim priority, and affirmed. The facts are stated in the opinion.

A. L. Chandler, for complainant. [Brief confined to a discussion of the testimony.—REPORTER.]

John D. Conely, for complainant, contended as stated in the opinion, and cited the authorities found in footnote.

Alex. D. Fowler, for defendant Brown, contended:

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1. When Quinnin paid Brown the $4,800, and took an assignment to complainant, he extinguished $4,800 of the mortgage as between Brown and the Quinnins; citing *Winans v. Wilkie*, 41 Mich. 266; *Champney v. Coope*, 34 Barb. 539; Hilliard, Mortg. pp. 541, 542, § 11, p. 535, § 5; and the effect would have been the same if complainant had paid the $4,800, instead of her husband, as her interest was the same as his, they holding the title by entireties.
2. The cases cited, as to a preference to complainant under the assignment, are not applicable, because:
   a—She is a party to the bond and mortgage, with the consideration for the assignment paid by her husband and co-obligor.
   b—But if this was an ordinary case of the assignment of a part of a mortgage to a stranger, the rule in this State is settled in favor of *pro rata* security; citing *Cooper v. Ulmann*, Walk. Ch. 251; *English v. Carney*, 25 Mich. 182.
3. Complainant is estopped from claiming that the bond and mortgage are not a legal claim against her and the property; citing *Norton v. Nichols*, 35 Mich. 148; *Peake v. Thomas*, 39 Id. 154.

SHERWOOD, C. J. The complainant, who is the wife of the defendant Alexander Quinnin, files her bill of complaint in this cause to foreclose a mortgage executed by herself and her husband, on the 14th day of January, 1886, to Samuel J. Brown, upon the Central Hotel property, at Corunna, in the county of Shiawassee, to secure the sum of $8,800; she having on the 6th day of September, 1886, received an assignment of a $4,800 interest therein from said Brown. The mortgage was given to secure a bond, which the complainant and her husband had signed. Defendant Brown is the owner of the balance of the mortgage not assigned to complainant by him. The defendant Mary E. Wilson is a subsequent purchaser of the property, who assumed the payment of the mortgage as part of the purchase price. The defendant Henry C. Wilson is an occupant of the mortgaged property, and husband of Mary E. Wilson. The Atkinsons are execution creditors of Henry C. Wilson, and claim under a levy upon the property mortgaged.

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Defendant Brown appeared in the cause, and answered complainant's bill. The Atkinsons appeared and made formal answer, claiming therein to be subsequent incumbrancers. The bill was taken as confessed by the other defendants.

A bill of sale was given of the furniture in the hotel at the same time the mortgage was made, as additional security for the money secured by the mortgage, not exceeding $3,000.

On the 1st day of January, 1887, some interest and $500 principal became due, and no part of which has been paid. On the 4th day of March, 1887, the whole amount of the mortgage was declared due by Mr. Brown, which might be done under the terms of the mortgage. The testimony tends to show the property cannot be sold in parcels.

The bill was filed on the 6th day of April, 1887. In addition to the usual prayer of a bill in foreclosure cases, the complainant asks in this case that by reason of her marriage her signature to the bond be decreed a nullity, and she be released from all personal liability thereon. The complainant also asks that she be paid her $4,800 out of the proceeds of the sale of the mortgaged property, before any payment shall be made to the defendant Brown.

It appears from the record that in November, 1885, defendant Alexander Quinnin bought by contract 39 acres of land, known as part of the Wheeler farm, near Corunna, of defendant Brown. Quinnin's interest in this land was $550. He also owned a lot in Detroit, worth $300.

Mrs. Quinnin, the complainant, was the owner of a piece of land in Detroit, which was held by one Grant, under contract for its purchase. This parcel Mrs. Quin-

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nin bought of Mrs. Brown, with the contract of Grant outstanding, and which called for the payment of $2,300 as the purchase price. Mrs. Quinnin's interest on January 14, 1886, was considered worth $1,850. She also owned besides a lot on Fourteenth avenue in Detroit, worth $950. She also had personal property worth $200. So that Mrs. Quinnin's separate estate held in her own right on the fourteenth of January, 1886, amounted to $3,000. She also owned, with her husband, a mortgage on lands in Oakland county for $850; her interest therein being joint with that of her husband. This mortgage was called the "La More Mortgage."

The defendant Brown lived in Detroit, and was engaged in the real-estate business and agency. C. D. Smith owned the Central Hotel at Corunna, and had placed it in Brown's hands, to be sold at this time. About the 14th of January, after some weeks of negotiating, Brown succeeded in bringing about a trade. By the arrangement Brown was to buy the hotel property and its furniture for the sum of $13,500, and pay mainly for it in city property that Brown then had in Detroit. This was done. Then Brown sold the hotel and furniture to the Quinnins, who gave property therefor to the amount of $4,700, and were to give a mortgage for the remaining $8,800.

The property the Quinnins let Brown have, which was taken by the latter for $4,700, was, first, Mrs. Quinnin's interest in the Grant contract, $1,850; second, her lot on Fourteenth street in Detroit, $950; and her personal property, $200. This was all Mrs. Quinnin's sole property. Mr. Quinnin furnished his lot in Detroit at $300, and his interest in the contract for the 39 acres of land, $550; and Mr. and Mrs. Quinnin put in also the La More mortgage, then claimed to be worth $850.

The deed of the hotel property was made directly from Smith to the Quinnins,—to Alexander Quinnin and Mary

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E. Quinnin, his wife, or the survivor; but the bill of sale was given from Smith to Brown. Smith was paid by Brown, and the Quinnins had nothing to do with Smith. The bond and mortgage given by the Quinnins secured the payment of the said $8,800, and is signed by both of them; the mortgage containing the following clauses:

"And when the sum of $3,000 shall have been paid on this mortgage, said Brown agrees to execute a bill of sale to said parties of the first part of all the furniture, effects, etc., contained and described in the bill of sale,"—

That had on that day been given by Smith to Brown; also that should any proceeding be taken to foreclose the mortgage, either in law or chancery, or in any other manner provided by law, the Quinnins should pay $100 as a reasonable solicitor or attorney fee therefor, in addition to all other legal expenses.

It is claimed by counsel for complainant that the bond was void as against Mrs. Quinnin; that by the means used, and the disposition made of her property, the laws for the protection of married women have been completely ignored, and that her separate property had gone beyond her control. In the view we take of the case, those questions do not necessarily arise, and will not therefore be considered.

The trade completed as above stated, the Quinnins went into the hotel, and commenced business. In April following, engineered by Mr. Brown, another arrangement was entered into regarding the mortgaged property, which resulted in the Quinnins selling the hotel and furniture to parties who were introduced by Mr. Brown into the business, and whose names were Wilson. Mrs. Wilson became the purchaser, at the sum of $14,600, in payment of a part of which she assumed the payment of the $8,800 mortgage. Of this consideration the Quinnins received

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the Wheeler farm, consisting of about 79 acres, subject to a mortgage of $3,500, which was deeded to Mr. Quinnin, and the La More mortgage was returned to him and his wife, by Mr. Brown destroying the assignment to him.

Brown now held the $8,800 mortgage upon the hotel, securing Mr. and Mrs. Quinnin's bond for that amount. He for some reason desired to get back the Wheeler farm; and on the 6th day of September, 1886, the Quinnins conveyed the Wheeler farm and La More mortgage back to Brown, and Mrs. Quinnin received from Brown an assignment of $4,800 interest in the bond and mortgage of $8,800. It is claimed by Brown that, when he made this assignment to Mrs. Quinnin, there was a verbal agreement made by her and her husband, whereby they promised that if they were compelled to take the hotel property they would give him back a new mortgage of $4,000, and take up the old one. Mr. Brown does not swear that the agreement was with Mrs. Quinnin, or that such mortgage should be a first mortgage, but says Mr. Quinnin said he was willing Brown's mortgage should be first. The agreement claimed by Brown is not found in the answer.

The Wilsons were in possession of the hotel property when the bill was filed, and complainant still resided on the Wheeler farm. The complainant tried to have defendant Brown file a bill to foreclose the mortgage, but he failed to do so. She finally filed her bill to protect her interest and enforce her claim.

Such is substantially the case presented by the pleadings and proofs, and about the only question in the case to be determined is, whose claim ought in justice and equity to be first satisfied on a sale of the mortgaged property, the complainant's or Mr. Brown's?

Quite a large amount of testimony was taken in the

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case, and upon the hearing the circuit judge held that the assignment does not of itself give priority to complainant's claim, and made a decree that she share *pro rata* with the defendant in the fund arising upon the sale of the property mortgaged, under the foreclosure, including also the personal property that passed by the sale of the hotel, until both claims are satisfied in full, and that complainant recover her costs of Brown, and that the Atkinsons are entitled to have brought into court any surplus that may remain after paying the mortgage and interest, costs and expenses of sale; and that they may be permitted to show their right thereto, to the extent of their claim.

Under all the circumstances appearing in this record, Brown received from Mrs. Quinnin and her husband $4,800, which he owed to them when he took the Wheeler farm back. The most of this money belonged to Mrs. Quinnin. This he did not pay when the exchange was made, but he assigned to her that amount in the large mortgage. This money for which this assignment was made was purchase money of real estate. The amount assigned was so many dollars. It was not to be taken, by the terms of the assignment, from the last installments of the mortgage, nor from the last moneys paid or collected upon the mortgage, nor after some other debt was satisfied; and it is quite apparent that the parties contemplated, when the assignment was made, that the complainant's interest was to have priority over any other. In no other way could it be made certain that the amount Mrs. Quinnin was to receive would be realized from a foreclosure. We have no doubt but that Mrs. Quinnin, both under the facts and the law, was justly entitled to have her claim first satisfied. We think the evidence and circumstances combine in support of what she says the understanding was. The authorities

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cited by complainant's counsel we think fully sustain this position.[1]

This is not the case of an assignment of one of several notes secured by mortgage, where the parties holding the notes must share *pro rata* in the proceeds of the securities. The decree entered at the circuit must be modified by making her claim the first to be satisfied in full, and, thus modified, will be affirmed, with costs against defendant Brown.

The other Justices concurred.

JOHN HICKS ET AL. v. WILLIAM S. TURCK AND TOWNSEND A. ELY.

Equity—Agreement to execute note and mortgage—Specific performance.

The specific performance of an agreement by grantees who have taken possession of the land conveyed to them, which is located in another state, to secure the unpaid purchase price by note, and a mortgage upon the land, will be enforced in equity.

Appeal from Clinton. (Smith, J.) Argued June 28, 1888. Decided November 1, 1888.

Bill for specific performance. Defendants appeal. Decree overruling demurrer, with leave to answer, affirmed. The facts are stated in the opinion.

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[1] *Bryant v. Damon*, 6 Gray, 564; *Salzman v. His Creditors*, 2 Rob. (La.) 241; *Bank v. Bank*, 9 Wend. 410; *Van Rensselaer v. Stafford*, Hopk. Ch. 569; *Barkdull v. Herwig*, 30 La. Ann. 618; *Wood v. Callaghan*, 61 Mich. 402; *Hanford v. Robertson*, 47 Id. 100.

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O. L. Spaulding, for complainants, contended:

1. Specific performance will be decreed when the party wants the thing in specie, and cannot be otherwise compensated, or where compensation in damages would fall short of the redress to which he is entitled, or when award of damages would not put him in as beneficial a situation as a specific performance of the agreement; citing *Stuyvesant v. Mayor*, 11 Paige, 414; *Dye v. Forbes*, 24 N. W. Rep. 309; 2 Story, Eq. Jur. § 716; *McMullen v. Vanzant*, 73 Ill. 190.
2. If the objection is now made, which was not made below, that the bill must fail because the lands are in Nebraska, we cite: *Ward v. Arredondo*, Hopk. Ch. 213; *Mitchell v. Bunch*, 2 Paige, 606; *Sutphen v. Fowler*, 9 Id. 280; *Newton v. Bronson*, 13 N. Y. 587; *Cleveland v. Burrill*, 25 Barb. 532; *Pingree v. Coffin*, 12 Gray, 304, 305.

James L. Clark and *George P. Stone*, for defendants, contended:

1. It is not a matter of course to decree specific performance of contracts; citing *McMurtrie v. Bennette*, Har. Ch. 124; *Williams v. Williams*, 6 N. W. Rep. 815; *Menasha v. Railroad Co.*, 27 Id. 169.
2. The general rule is that equity will not entertain jurisdiction to enforce the specific performance of a contract respecting personalty; citing *Pierce v. Plumb*, 74 Ill. 327; *Parker v. Garrison*, 61 Id. 250; *Barton v. DeWolf*, 108 Id. 195; *Cohn v. Mitchell*, 115 Id. 124; *Jones v. Newhall*, 115 Mass. 244.
3. Equity will not decree specific performance unless something more is to be accomplished than mere payment of money, because the law furnishes an adequate remedy; citing *Pierce v. Plumb*, 74 Ill. 327; *Bonebright v. Pease*, 3 Mich. 318; *Kauffman's Appeal*, 55 Penn. St. 383; *Dech's Appeal*, 57 Id. 467.
4. The agreement sought to be enforced is simply one for the payment of a sum of money in specific articles, and upon default an action at law lies the same as upon a promissory note; citing *Pinney v. Gleason*, 5 Wend. 394; 3 Pars. Cont. (7th ed.) 216, 217; *Trebilock v. Wilson*, 12 Wall. 687.
5. The courts of one state have no power or jurisdiction over the title to land in another state; citing *Cooley v. Scarlett*, 38 Ill. 316.

SHERWOOD, C. J. The bill in this case is filed to obtain a decree for the specific performance of a contract reading as follows:

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"RIVERTON, NEB., October 31, 1885.

"Due David S. French, attorney in fact for Hicks, Bennett & Co., eighteen thousand three hundred and sixty-six dollars ($18,366.00), being the balance on consideration of one-half interest in personal property and lands this day sold Robert M. Steel, John Hicks, William S. Turck, and Townsend A. Ely; above sum to be paid by assignment of a certain mortgage on lands in Gratiot county, Michigan, to said David S. French, attorney, for $2,000; and balance of sixteen thousand three hundred and sixty-six dollars ($16,366) to be paid by promissory note due and payable on or before five years from date, with annual interest at seven per cent. per annum, said note secured by mortgage on the undivided one-half interest in said ranch property, as collateral security for payment of said sum of sixteen thousand three hundred and sixty-six dollars, and interest as aforesaid.

"WM. S. TURCK.
"TOWNSEND A. ELY."

The bill states that at the time the note was given the complainants were a firm located and doing business under the name of Hicks, Bennett & Co., in Michigan, and were seized of a large quantity of lands in the county of Franklin, in the state of Nebraska, the particular description of which is fully set out in the bill; that on that day said firm, by David S. French, its attorney in fact, conveyed by full covenant warranty deed the lands described in the bill to John Hicks and Robert M. Steel, who resided at St. Johns, Mich., and the defendants, who resided at Alma, Mich., for the sum of $32,732; that the purchasers upon said sale entered upon said premises, and ever since have had the actual possession thereof.

That on the same day Hicks, Bennett & Co. sold to the grantees in said deed all the cattle, stock, hay, grain, farming implements, tools, and other personal property on said land for the sum of $10,000; that in consideration of the premises, and in payment to the complainants for the undivided one-half of the said real and personal property, Turck and Ely, who knew all about the

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lands, the title of complainants thereto, and the condition of the personal property, agreed to pay to complainants $21,366, being one-half of the total purchase price of the land and personal property, the payments to be made as follows: $3,000 in their promissory note due in two years, which they then gave, and that they would secure and pay the balance of the purchase price by assigning to the said French, who was attorney in fact of the complainants, a certain real-estate mortgage of $2,000 on lands in Gratiot county, Mich., and for the remaining sum of $16,366 would at once execute and deliver to French, for complainants, their promissory note for that amount, due on or before five years from the date thereof, with annual interest at 7 per cent., and secure the payment of the same by mortgage on the undivided half of the lands so deeded to them.

That the said $2,000 mortgage was assigned, as promised, by the said defendant Turck, but the said defendants refused to and have not made the note and mortgage to complainants for the $16,366, as they agreed to do, and still refuse to comply with complainants' request for them so to do.

Complainants further say and aver in their bill that they have complied in all things with and fully kept their agreement with said defendants, and performed all its requirements on their part in the premises, and are now entitled to have said note and mortgage from said defendants as they promised to make them, in accordance with the written agreement hereinbefore referred to, and which was, after being made by defendants, duly given to said French, for the complainants, who now have the same.

The complainants ask the court, upon the foregoing facts, to decree that defendants specifically perform their agreement with the complainants, and execute and deliver to them said note and mortgage. The defendants

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appeared in the case, and demurred to complainant's bill, assigning two grounds of demurrer:

1. That the facts set up in the bill are not sufficient to entitle complainants to the relief prayed.
2. That complainants have a complete and adequate remedy at law touching all matters set up in the bill.

The cause was heard before Judge Smith in the Clinton circuit, who made a decree overruling the demurrer, and allowing defendants 20 days in which to answer.

We are satisfied this decree was proper. The defendants had received the full consideration for what the complainants asked. The complainants might have had a remedy at law; but we are by no means sure it would be an adequate one. On the contrary, the remedy at law, when resorted to, is liable to a very great variety of perplexities and embarrassments arising from the want of the note promised, the refusal to give which is a gross violation of their contract, for which the demurrer concedes no excuse can be given. The note was liable to run five years, and complainants had the right to have the amount owing thereon during all the time it did run secured by the mortgage. The land was not within the jurisdiction of the courts in this State. It could be easily transferred to *bona fide* holders, and the perils of insolvency are not beyond the possibilities among business men, as all experience shows. All these are circumstances of more or less embarrassment when the remedy at law is resorted to. It is but equitable and just that this contract should be specifically performed upon the showing made in this bill.

This bill is not filed for an accounting, nor to enforce payment of a debt, but to compel a party to comply with his promise, after receiving the full consideration upon which it was made, to make and execute evidence of indebtedness, and give security for the payment thereof.

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There is no proceeding at law which can accomplish this. Equity alone can take cognizance of such a case, and do justice between the parties. The bill furnishes a clear case for the exercise of that sound legal discretion which the court must always use in awarding specific performance, and the learned circuit judge was right in so holding.

The decree below will be affirmed, and the cause remanded, with instructions to the circuit judge to allow defendants 20 days in which to answer the bill after *remittitur* shall have been filed.

The complainants will recover their costs.

The other Justices concurred.

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MINA LORSCHER v. THE SUPREME LODGE KNIGHTS OF HONOR.

Benefit associations—Knights of Honor—Certificate—Proofs of death—Denial of execution.

1. Under the constitutions and regulations of the Knights of Honor, when the supreme lodge signs a benefit certificate, and forwards it to the subordinate lodge, the contract is complete, and it is the duty of the subordinate lodge to deliver it, and it holds it for the member until delivered to him.
2. In such a case, if the local lodge assumes the right to retain the certificate because of alleged fraudulent practices and representations of the member at time of becoming such, the beneficiary in a suit to recover the insurance may be excused from producing the certificate on the trial.
3. Where, in such a case, there is sufficient testimony to enable the jury to determine what the contract of insurance was, if the certificate contains any special provisions or limitations which do not appear from the constitutions and regulations

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and other evidence in the case, it is the defendant's duty to produce it.

4. Insurance, if it may be so called, in benefit associations, is usually for the benefit of the widow or other person dependent upon the member in his life-time, and where the constitution makes it the duty of the subordinate lodge to report the death of a member to designated officers of the supreme lodge, and to make a report to the state medical examiner of the circumstances of his last illness and death, and to notify the beneficiary that it is unnecessary to employ or pay any person for obtaining payment of the benefit, the intention is manifest that the officers of the local lodge undertake to make and certify the proofs of death, and to do everything required to place the beneficiary in the possession of the benefit secured by the certificate.

5. When, in a suit to recover such benefit, the defendant sets up the death of the member, and refuses to pay on the ground of fraud practiced in becoming such, it will be presumed that proofs of death were made by the subordinate lodge.

6. Where, in such a case, the declaration avers that there was duly prepared a paper, in the usual form, assuring to the member and to the plaintiff the benefit sued for on the death of the member, which averment is not denied by the defendant under circuit court rule 79, the execution of the certificate will be deemed to be admitted for the purposes of the trial, which admission will support a verdict in favor of the plaintiff, although the certificate is not introduced in evidence.

Error to Berrien. (O'Hara, J.) Argued June 13, and re-argued October 2, 1888. Decided November 1, 1888.

Assumpsit for benefit insurance. Defendant brings error. Affirmed. The facts are stated in the opinions.

Padgham & Padgham, for appellant, contended:

1. The burden of proof was upon the plaintiff to show—

a—That a petition for membership was duly presented to and approved by the lodge.

b—That the applicant presented himself to the medical examiner, and answered the questions required of him.

c—The issuance of the certificate of membership or policy.

d—Payment of the dues and assessments required of the deceased for the benefit of the widow and orphans' benefit fund, up to the time of his death.

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e—Notification to the lodge of the death of the member, and request for and refusal of payment; citing Bailey's Onus Prob. 584; *Ingalls v. Eaton*, 25 Mich. 32; *Berringer v. Iron Co.*, 41 Id. 305.

2. Upon the trial the petition or application was the only one of the foregoing points proved.

3. Plaintiff failed to make out any contract relations between herself and the defendant through the assurance of her husband's life, and entirely failed to prove performance by him of any contract whatever.

4. The policy (benefit certificate), unless admitted, should be produced or accounted for, and the signatures, including countersigning, proved; citing Abbott's Trial Ev. 477; *Hunter v. Ins. Co.*, 4 Hun, 794; and the policy is sufficient to show a contract without proof of the application; citing *Edington v. Ins. Co.*, 67 N. Y. 185; and the fact that there was no application does not affect the policy; citing May, Ins. § 169; and these cases show that the policy, and not the application, contains the contract.

Clapp & Bridgman, for plaintiff.

CHAMPLIN, J. Defendant is a corporation organized under the laws of the state of Missouri. The object of the corporation is stated in section 2 of the certificate of organization, as follows:

"Sec. 2. The objects of the corporation shall be to unite fraternally all acceptable white men of every profession, business, and occupation; to give all possible and material aid in its power to its members, and those depending on its members, by holding moral, instructive, and scientific lectures, by encouraging each other in business, and by assisting each other to obtain employment; and to promote benevolence and charity by establishing a widow and orphans' benefit fund, by contributions from members of the order of Knights of Honor, from which, upon satisfactory evidence of the death of a member of the said order, who is a contributor to said fund at the time, and who has complied with its lawful requirements, a sum not exceeding five thousand dollars ($5,000) shall be paid to such member or members of his family, or person or persons dependent on him, as he may direct and designate by name; to provide for creating a fund or funds for the relief of sick and distressed members, and

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to ameliorate the condition of humanity in every possible manner."

Section 7 of said certificate provides as follows:

"The said supreme lodge shall have power to create, hold, and disburse the funds named in the objects of the corporation, for promoting benevolence, and relieving the sick and distressed, under such constitutions, laws, and regulations as it has now adopted, or may deem necessary to adopt; and said fund shall be exempt from execution, and shall under no circumstances be liable to seizure or appropriation by any legal or equitable process, or to any debt or debts of its living or deceased members; and said fund shall be exempt from the laws, rules, and regulations governing the insurance bureau of this state."

The corporation adopted constitutions, laws, and regulations for creating, holding, and disbursing the funds referred to, forming a complete system, which constitute the laws and rules by which all the rights, interests, duties, and obligations of the members are defined, regulated, controlled, and enforced, and the rights and obligations of the corporation are prescribed. These constitutions, laws, and regulations prescribe and point out the method of becoming members of the supreme and subordinate lodges, and when and in what manner the beneficiary named by a member of a subordinate lodge becomes entitled to share in the fund provided for the benefit of widows and orphans.

A candidate possessing the requisite qualifications, must sign a written application in a prescribed form, in which he must designate the beneficiary. A committee of three is then appointed to investigate his character, and, if found favorable, one of the committee accompanies the candidate to the lodge medical examiner, who makes an examination, and the applicant is required to answer in writing certain questions, and the medical examiner is required to make a certificate; and his examination and certificate, if he approve the candidate, is forwarded to

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the state medical examiner, who makes a report thereon, and, if favorable, then upon payment of the fees prescribed by the lodge, and the amount required to be paid into the fund for the benefit of the widows and orphans, he is initiated into the lodge, and receives the degree of "Manhood."

The assessments which he must thereafter pay depend upon his age when initiated. If between 18 and 45, it is one dollar for each assessment, and every member must pay at least two assessments each month, unless otherwise ordered by the supreme reporter; which assessments are to be made on or before the end of each month. After the member is initiated, the initial assessment must be forwarded by the lodge with the first assessments called to the supreme lodge subsequent to the date of his obtaining the degree. Such assessments are required to be forwarded to the supreme treasurer between the 1st and 10th day of each month.

Every lodge is required to forward to the supreme reporter all applications for beneficiary membership immediately after the applicant receives the degree, and with each application one dollar to pay for a benefit certificate, and for making record of membership.

Each applicant must enter upon his application the name or names of, and relationship or dependence of, the members of his family, or those dependent upon him, to whom he desires his benefit paid; and the same is required to be entered in the benefit certificate according to said direction, and no will is permitted to control the appointment or distribution of, or rights of any person to, any benefit payable by the order.

On receipt of the application and fee the supreme reporter enters the name, age, occupation, date of taking the degree, amount of one assessment, and such other facts as may be deemed necessary, upon a register, the

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roll of each lodge by itself, and indexed. He numbers and files the application in his office, and returns to the reporter of the subordinate lodge a benefit certificate, signed by the supreme dictator and himself, under the seal of the supreme lodge, and made payable as the member shall have directed in his application; and the subordinate lodge is required to enter upon record the number thereof. It is this benefit certificate which completes the contract relations between the corporation and the members of the subordinate lodges. These benefit certificates contain the only engagement and promise to pay which the member receives from the corporation, and it is designated in the constitutions, laws, and regulations as the document which creates the liability of the corporation to pay the beneficiary therein named according to its terms. The only purpose for which the name of the beneficiary is inserted in the application is to apprise the supreme reporter to whom the benefit is to be paid, that he may insert the name in the benefit certificate. After it is inserted in the certificate, that becomes the guide and controlling document in all future transactions with the member and with the beneficiary. The beneficiary has no present interest, during the life of the member, either in the certificate or fund from which payment is to be made.

The member may at his pleasure, upon complying with the regulations of the supreme lodge, change the beneficiary named in his benefit certificate; and hence the beneficiary named in the application may not be the beneficiary to whom the corporation is obliged to pay. If the benefit certificate be lost or destroyed or beyond the control of the member, he may in writing surrender all claim thereto, and direct a new certificate to be issued to him, payable to the same or other beneficiary, in

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accordance with the laws of the order. The issuing of such new benefit certificate shall cancel and render void all previous certificates issued to such member.

A full-rate member may change to a half-rate member; but he must first surrender his benefit certificate, and receive a new half-rate benefit certificate. He may withdraw entirely from the order, and receive a "final card," by paying in full all assessments and dues, and surrendering his benefit certificate.

By article 7, §§ 14, 15, the subordinate lodges, reporters, financial reporters, and treasurers of subordinate lodges, in making remittances for the widow and orphans' fund, in giving notice of assessments, and in collecting and forwarding assessments to the supreme treasurer, are declared to be the agents for the members of their lodges, and shall not be the agents of the supreme lodge. Failure to pay assessments by a member operates as a suspension, and terminates his right, and that of his beneficiary, to any payment from or participation in the widow and orphans' fund.

Likewise any failure or neglect of the subordinate lodge to forward all assessments due from its members to the supreme treasurer before the 10th day of each month operates *ipso facto* to suspend the lodge; and every member of such lodge, after the lapse of 30 days from the recording of such suspension, is precluded from the benefits of said fund. Provision is made for re-instatement within 30 days, but unless it is done in that time no member dying after that time is entitled to any payment from the corporation, unless he held a withdrawal or traveling card, unexpired.

The beneficiary's right to receive anything from the fund provided for widows and orphans arises only on the death of a member, and complying with certain requirements of

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the constitutions, laws, and regulations. These requirements are that the member at the time of his death shall have been in good standing in his lodge, and shall have paid all the assessments to the widow and orphans' fund.

Article 7, § 5, provides as follows:

"On the death of a member who has attained the degree of the subordinate lodge, the reporter of his lodge shall immediately forward to the supreme reporter a notice of such death. Such notice must state the number of his benefit certificate, his name and age, the date he was admitted to the degree, the date of his death, the amount he has paid into the widow and orphans' benefit fund, and that he was in good standing, and entitled to the half or the whole of the benefit this order pays, and shall state therein to whom he has directed his benefit to be paid."

Section 12 of article 8 provides as follows:

"Duplicate death notices shall be sent to the State medical examiner by lodge reporters; and it shall be the duty of the state medical examiner to investigate all doubtful cases, and, when the true cause of death is ascertained, forward the notice to the supreme reporter. No order shall be drawn on the W. O. B. fund until the notice of death has been passed upon by the state medical examiner of the grand jurisdiction where such death occurred, whose duty it is hereby made to report thereon without delay."

Section 4, article 3, provides that the supreme reporter—

"Shall, when properly notified by a subordinate lodge reporter of the death of a member entitled to the benefits of the order, within sixty days after the receipt by him of satisfactory proof of the death of a member, draw and attest an order on the supreme treasurer for the amount due on said death, payable to the person or persons designed as beneficiaries in the benefit certificate, and forward the same to the reporter of the subordinate lodge to which such deceased member belonged."

Section 5 of article 3 provides as follows:

"The supreme treasurer shall receive from subordinate

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lodges all money for the widow and orphans' benefit fund, * * * and shall pay all orders drawn on him in accordance with the laws of the order. He shall keep a separate account of the widow and orphans' benefit fund, and shall pay out of it no money whatever except upon orders drawn on him for the payment of death benefits."

On January 21, 1887, John Lorscher, then a resident of Millburg, Mich., applied to Bell Lodge, No. 2,143. Knights of Honor, to become a full-rate member of the lodge. He was 37 years of age, and in his written application agreed, in consideration of his being received into the order of the Knights of Honor, and admitted to a participation in the widow and orphans' benefit fund, he would faithfully obey all the constitutions and laws of the order, in all the departments thereof, and that a compliance on his part with the laws, rules, and regulations then in force or thereafter enacted by the order was the express condition upon which he and his beneficiaries should be entitled to participate in said benefit fund to the extent and amount provided in the constitutions and laws of the order, and that the benefit certificate to be issued to him should have no binding force whatever unless he contributed and continued to contribute his share and portion to the widow and orphans' benefit fund when due and ordered in accordance with the rules and regulations of the order. He directed that his benefit be paid to his wife, Mina Lorscher. He was duly investigated, and examined by the local medical examiner, and such examination was approved by the state medical examiner, and Lorscher was balloted for, elected, and the degree conferred upon him on January 26, 1887. He paid his fees to the lodge, and one dollar to the widow and orphans' benefit fund, to the reporter of Bell Lodge. He died on February 22, 1887.

This action was brought by Mina Lorscher to recover

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from the corporation called "The Supreme Lodge Knights of Honor" the sum of $2,000 alleged to be due to her as the beneficiary of said John Lorscher.

The declaration contains three special counts and the common counts. In each of the special counts the plaintiff sets forth the membership of John Lorscher in Bell Lodge, No. 2,143, Knights of Honor, the payment of all fees, dues, and assessments, and in the first and second counts the preparation of a paper in the nature of an assurance of his life, thereby promising to pay plaintiff $2,000 upon his death; avers that she is unable to set this paper forth in full, for the reason that some person or persons connected with the local lodge, unknown to the plaintiff, keep the same away from her.

In the third count the declaration alleges that the defendant is a co-operative beneficiary society, authorized to assure the lives of members of subordinate lodges, and cause assessments to be made to pay such insurance; that Bell Lodge, No. 2,143, Knights of Honor, was such subordinate lodge, authorized to receive members for a certain membership fee, which was, among other things, a premium, and would entitle the member to an insurance upon his life to the amount of $2,000, to be paid on his death to his widow, and thereby make the defendant liable for such sum in the event of the death of said member; that her husband became a member, and paid the membership fee, and she was then and thereby assured by the defendant for the sum of $2,000, and was entitled to receive the same as soon as he died.

The declaration further avers the death of John Lorscher on February 22, 1887, and that the said sum of $2,000, assured to the said John Lorscher, was payable, by the agreement made with him by defendant and its local lodge, to the plaintiff, as soon as he died; avers that she has made all necessary proofs to the defendant, and

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its local lodge and officers thereof, of his death, and has requested that it pay said $2,000, which defendant refuses to do, nor does its local and subordinate lodge cause any assessment to be made to pay the plaintiff, nor do they pay, to her injury, etc.

It will readily be seen that the action cannot be maintained under the third count. The constitutions, laws, and regulations enter into and form part of the contract between the corporation and its members. The right of a member or his beneficiary to be paid any part of the fund provided for the benefit of the widow and orphans is governed entirely by his benefit certificate, and the constitutions, laws, and regulations of the order. The agreement of the defendant is not to pay absolutely $2,000 to the beneficiary named, notwithstanding the member has paid his assessment. The agreement is, further, that such assessment shall be paid by the subordinate lodge to the supreme treasurer.

The parties are bound by just such contracts as they have made, which are free from fraud or illegality. Courts cannot make contracts for parties, or render a party liable on a different basis from that upon which his liability was mutually stipulated for. Both the constating act of incorporation and the constitution require, as a condition precedent to payment to the beneficiary, that satisfactory proofs or evidence of the death of the member be furnished to the specified corporate official.

The testimony is returned in full in the record before us, from which it appears that evidence was introduced of the incorporation of defendant corporation under the laws of the state of Missouri; of the application for membership; the examination of the lodge medical examiner, and its approval by the state medical examiner; the records of the lodge, showing that Lorscher was balloted for and elected, and the conferring of the degree upon

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him; the payment by him of the lodge fee and assessment for the widow and orphans' benefit fund; his death on the 22d day of February; and the fact that the money had not been paid by defendant to plaintiff.

On the former hearing of this case it did not clearly appear that any benefit certificate had been issued by the supreme lodge, and forwarded to Bell Lodge for Lorscher. It was admitted upon the re-argument of this case, by the counsel for defendant, that the certificate had been executed and forwarded to Bell Lodge, but it refused to hand it over to Lorscher or his wife on account of the fraud set forth in their notice under the plea of the general issue.

This notice asserted that Lorscher had become a member of Bell Lodge, No. 2,143, by fraudulent practices; that in his application he had falsely represented that he had never been addicted to the excessive or intemperate use of malt, alcoholic, or narcotic stimulants, when in fact he was at the time addicted to the excessive and habitual use of hard cider and other intoxicating drinks as a beverage; that he falsely represented that he had never had an habitual cough, or disease of the lungs, or of the stomach, and falsely represented that he was in good health, and free from any symptoms of disease, and there was nothing to his knowledge or belief in his physical condition, family or personal history or habits, tending to shorten his life, which was not distinctly stated in his application.

On the contrary, the defendant asserts that it will show on the trial that Lorscher did have an habitual cough, and did have disease of the lungs and stomach, and was afflicted with pulmonary consumption, and had before that consulted a physician in Chicago, and frequently within a year before he made application he was under the care of physicians at Benton Harbor and Chicago for chronic

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sickness, and immediately after his medical examination he was obliged to apply to physicians for medical aid and treatment; and that if he ever had any contract of assurance it was void on account of such fraud; and immediately on the discovery of such fraud by the officers of Bell Lodge they at once sought said Lorscher, to tender him back the fees he had paid, and inform him that they had been deceived and defrauded by him, but said Lorscher was dead before such tender could be made, and such fees were tendered to the plaintiff, and she refused to receive them.

That on account of the false and fraudulent practices towards said Bell Lodge by said Lorscher the supreme lodge refused to issue any papers entitling him to membership, and refused to issue or deliver any "benefit certificate" to him, or to any other person designated by him, or to plaintiff, and for the reasons above stated.

Under this plea and notice the issue between the parties was pretty clearly defined. If the plaintiff succeeded in establishing the contract relations between her husband and the defendant which are usually evidenced by the "benefit certificate," then she would, under her evidence, be entitled to recover, unless such contract was impeached for the fraud set up in the plea, and the burden of proving such fraud was upon the defendant.

Under the constitutions and regulations of the order, when the supreme lodge signs the benefit certificate, and forwards it to the subordinate lodge, the contract is complete. It is the duty of the lodge to deliver it, and it holds it for the member until it is handed over to him. In this case it appears that it had been received by Bell Lodge, but not handed over. The local lodge assumed the right to retain it because of the alleged fraud, and the defendant asserts and relies upon such fraud as a defense to the action. The written contract being in the

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possession of the defendant, or under its control, the plaintiff may be excused from producing it at the trial, under the circumstances of this case.

There was testimony enough in the case from which the jury could determine what the contract between Lorscher and defendant was, and, if the certificate contained any special provisions or limitations which did not appear from the constitutions and regulations and other evidence in the case, it was its duty to produce it. Good faith and fair dealing with the beneficiary required the defendant to do this, in view of the provisions of section 4, art. 5, of the constitution governing subordinate lodges, which makes it the duty of the reporter of the subordinate lodge,—

"Immediately on the death of a member of his lodge, to report such death to the supreme reporter and to the grand reporter for statistical purposes, stating the time the deceased received the degree, and the amount paid by him into the widow and orphans' benefit fund, and to make a report to the state medical examiner of the circumstances of the last illness and death of the member, in such form as may be required of him. He shall also forthwith notify the beneficiary or beneficiaries named in the benefit certificate that it is not necessary to employ or pay any person for obtaining payment of the benefit."

Insurance, if it may be so called, of this kind, is usually for the benefit of the widow or other person dependent upon the member in his life-time; and the intention is manifest that the officers of the lodge of which he was a member undertake to make and certify the proofs of death, and to do everything required to place the beneficiary in the possession of the benefit secured by the certificate. It will be presumed that it was done in this case, when the notice given under the general issue sets up the death, and refusal to pay on the ground of fraud. The defendant offered no testimony of the facts set up as

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a defense, but insisted that the plaintiff had not made out a case.

The only defect that I perceive is a failure to introduce the benefit certificate in evidence. It is not denied that the benefit certificate was in the usual form of certificates issued by this corporation; and the plaintiff avers in her declaration—

"That there was duly prepared a paper, in the usual form, assuring to him, and to this plaintiff, the said sum of two thousand dollars on occurrence of the death of said John Lorscher."

This explicit averment of the execution of the contract is not denied by the defendant under rule 79 of the circuit court, and therefore its execution is deemed admitted for the purposes of the trial. Such admission by the pleadings was sufficient to support the verdict of the jury, and it would not comport with justice to send the case back for a new trial for the mere formal omission to read the certificate in evidence.

The judgment of the circuit court must be affirmed.

CAMPBELL and LONG, JJ., concurred with CHAMPLIN, J.

SHERWOOD, C. J. The plaintiff brought suit to recover of the defendant $2,000, which she claimed she was entitled to have of the defendant by reason of the death of her husband, who she alleged had made application to become, and was at the time of his death, a member of the order, and had paid all the moneys required of him for that purpose, and to obtain a certificate entitling him to all the benefits of the association.

Defendant is a Missouri corporation. There was a subordinate lodge of the order located at Benton Harbor, in the county of Berrien, called "Bell Lodge, No. 2,143, Knights of Honor." It was in this lodge that Mr. Lorscher became a member, and it was through this lodge

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that the defendant did business in the county of Berrien. The supreme lodge was made up of the several subordinate lodges throughout the country, which constituted the same.

Mr. Lorscher made his application to become a member of the lodge the 21st day of January, 1887, and was admitted about the 26th of the same month. He died February 22, 1887. He complied with all the requirements of the order, and paid all moneys due from him to the order, while he lived, including the charges for the benefit certificate, and there is no pretense but that he was entitled thereto when he died. The application in this case reads as follows:

"Petition for Membership in the Knights of Honor. [Subordinate Lodge Seal.]

"*To the Officers and Members of Bell Lodge, No. 2,143, K. of H.:*

"Having been made acquainted with the objects of your order, and fully indorsing them, I desire to become a full-rate member of your lodge.

"I am of sound bodily health; 37 years of age; was born on the 22d day of July, 1849; weigh 175 pounds; am 5 feet 8¼ inches high, and am married; by occupation a blacksmith, and reside at Millburg, State of Michigan.

"I hereby declare that I have never been expelled from this order; have not within six months been rejected, nor am I now under suspension by any lodge of this order; that I am not now a member of the order.

"I declare and promise that I do not now, nor will I, practice any pernicious habit that tends to shorten life.

"I hereby agree and contract, in consideration of my being received into the order of the Knights of Honor, and admitted to participation in the widow and orphans' benefit fund of the order, that I will faithfully obey all the constitutions and laws of the order, in all the departments thereof, and that compliance on my part with the laws, rules, and regulations now in force, or that may be hereafter enacted by the order, is the express condition upon which I and my beneficiaries are to be entitled to participate in said benefit fund, to the extent and amount provided in the constitution and laws of the order.

"I further agree and contract that the answers I shall make to the questions propounded by the medical examiner, as shown by the medical examiner's blank hereto attached, so far as the facts

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are in my own knowledge, shall be the truth, and, so far as not in my own knowledge, shall be true to the best of my information and belief; and I agree that they shall form the basis of my contract with the said supreme lodge and the said order.

"I further agree and contract that the benefit certificate to be issued to me shall have no binding force whatever unless I contribute and continue to contribute my share and portion to the widow and orphans' benefit fund, when due and ordered in accordance with the rules and regulations of this order.

"I further agree and contract that the payment of the proposition fee, or the entertaining of this application, unless I am duly elected and initiated according to the ritual and laws of the order, does not, and shall not, constitute membership, or give me any of the rights of a member.

"I furthermore agree and contract that if, for any cause as provided by the constitution and laws of the supreme, grand, or subordinate lodge to which I belong, I should be suspended, that I shall not be entitled to any benefit whatever during such suspension; nor shall it be lawful, in case of my death during such suspension, for any of my heirs, devisees, or legatees to receive any benefit or endowment whatever from the supreme or any grand or subordinate lodge of the Knights of Honor; and in case of expulsion from the order I agree to renounce for myself, my heirs and representatives, all the benefits granted by said order.

"I direct that my benefit be paid to my wife, Mina Lorscher.

"Given under my hand at Benton Harbor, State of Michigan, this 21st day of January, 1887.

"JOHN LORSCHER."

The benefit certificate never reached Mr. Lorscher, as appears by the testimony; but upon the argument it was admitted that such certificate was issued, but Lorscher died before it could be delivered, and it was then withheld from plaintiff. It is substantially conceded that the plaintiff is entitled to the benefits of the order, if any one is, under the application, and nothing has ever been paid to her by the order. The defendant denied all liability to the plaintiff from the beginning, and all the time refused payment on that ground.

The fact of death and notice thereof were sufficiently given. The constitutions and general laws of the order were put in evidence; and upon what is therein contained,

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and the foregoing facts, the case was heard at the circuit.

The jury rendered a verdict in favor of the plaintiff for the sum of $2,079.33. The defendant brings error.

When the trial closed the defendant asked the court to charge the jury that the defendant was entitled to a verdict on the ground that the plaintiff had shown no contract with the defendant upon which she could recover. The court refused the instruction, and defendant's counsel excepted. The court then submitted the case to the jury upon a general charge as to the law, with the result above stated.

The application for membership in the order contains the contract and promises on the part of the applicant upon which he is to receive the benefits conferred by the order upon its members. It is signed by the applicant; and when received by the order, and has been acted upon, and he has been received into the order by an election, the contract becomes completed between the parties, and is binding upon both, and so long as he complies with its provisions he is entitled to all the benefits it confers. The application when accepted by the subordinate lodge, and the applicant has been admitted to membership, brings him in contract relations with the supreme lodge; and these facts proved entitle the beneficiary named in the contract to have of the defendant all the benefits the contract calls for in case of the death of the applicant. The filing of the application with the supreme lodge only becomes necessary to secure the certificate, which will be evidence of those facts. The promise to pay contained therein is only a repetition of what has been given by its agent, the subordinate lodge, in pursuance of its constitution and the authority therein conferred. It is the existence of the facts which gives the beneficiary the right to benefits, and their existence may be shown by

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any competent evidence whenever it shall appear that such certificate has not been made, or, if made, not delivered. Any other conclusion would give more importance to form than substance. This the law will not allow.

The rules made regulating the manner of doing business between the subordinate and superior lodge, in which the applicant does not participate, cannot be made to deprive the beneficiary of her rights, even if omitted or entirely disregarded. She has no control over them. I think the circuit judge was right in refusing the instruction asked.

Section 1, art. 9, of the constitution and general laws of the order, provides that—

"Every lodge shall forward to the supreme reporter all applications for beneficiary membership immediately after the applicant receives the degree, and with each application one dollar to pay for a benefit certificate, and for making record of membership. Each applicant shall enter upon his application the name or names and relationship or dependence of the members of his family, or those dependent upon him, to whom he desires his benefit paid; and the same shall be entered in the benefit certificate according to said direction."

And section 2 says:

"On receipt of the application and fee, the supreme reporter shall enter the name, age, occupation, date of taking the degree, amount of one assessment, and such other facts as may be deemed necessary, upon a register; the roll of each lodge to be kept by itself, and indexed. He shall number and file the application in his office, and return to the reporter of the subordinate lodge a benefit certificate, signed by the supreme dictator and himself, under the seal of the supreme lodge, and made payable as the member shall have directed in his application; and the subordinate lodge shall enter on record the number thereof."

And it further provides, in case of loss of certificate, a

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new one may be issued, etc. These provisions relate to the internal business of the order, about which the applicant has no concern to know. It will be noticed, also, that the provisions of neither of these sections make a compliance therewith necessary to carrying into effect the provisions of the contract contained in the application. They are not conditions precedent, and form no part of the applicant's contract. None of them are to be performed by him. These sections relate entirely to the duties of the officers of the subordinate, grand, and supreme lodges; and I find nothing in any of the articles in the general laws or constitutions governing the Knights of Honor invalidating the contract contained in the application if the same is not forwarded to the supreme lodge, and certificate issued thereon.

If any certificate has been issued in this case, it should have been presented upon the trial by the defendant, and, if none had been issued, it was its duty to cause the same to be issued at once. The honor of the order, as well as the law and justice of the case, require this; and under such circumstances it is the duty of courts to see to it that after the voice of the husband has been silenced by death, and he can no longer urge his rights, the order shall not be allowed to break faith with the widow or children, and deprive them of the provisions he had made and paid for while living. I do not think any such results will be reached from a proper construction of the law and rules of the order applicable to the facts in this case.

I find no error in the remaining rulings of the court excepted to, and the judgment ought to be affirmed.

This opinion was written before a rehearing was ordered, which has been had. Nothing, however, has been suggested changing the views I have above expressed.

MORSE, J., concurred with SHERWOOD, C. J.

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JAMES A. LINDSAY v. FRANCIS M. EASTWOOD.

Drains—Improvement—Assessment of benefits—Lien for amount of tax—Warranty deed—Covenant against incumbrances.

1. Drain taxes assessed under the provisions of chapter 40, How. Stat., became a lien as soon as they became a charge on the land, by the assessment of benefits made by the drain commissioner.
2. Under chapter 40, How. Stat., the assessment was made by the drain commissioner, and the action of the supervisor was merely ministerial, for the purpose of collection; he having no authority to change or modify such assessment, nor to review it in any manner, but his duty simply being to levy the amount assessed by the drain commissioner upon his tax roll.
3. Under the drain law of 1881 (chapter 40, How. Stat.) the mere delay of the drain commissioner to present the assessment list to the supervisor, or of the supervisor in extending it upon the tax roll, did not invalidate the lien attaching to the land from the time of the assessment of benefits by the drain commissioner.
4. A covenant against incumbrances, made after the assessment of benefits by a drain commissioner, but before the supervisor has extended the tax, is broken as soon as made.

Error to Wayne. (Hosmer, J.) Argued October 4, 1888. Decided November 1, 1888.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Stewart & Galloway, for appellant.

B. T. Prentis, for defendant.

[The points of counsel are stated in the opinion.—REPORTER.]

CHAMPLIN, J. The plaintiff sued defendant in a justice's court, and declared orally on all the common counts, and specially for money paid to the use of the defendant

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for a ditch tax for the year 1884, which plaintiff paid to discharge an assessment levied upon certain lands which he purchased of defendant in the month of September, 1885, and for which he received a full covenant warranty deed.

In 1884 the county drain commissioner of Wayne county, by virtue of proceedings taken before him, cleaned out, deepened, and widened what was called the "Blakely Ditch." He ascertained the cost and expense thereof, and apportioned and assessed the benefits upon the several parcels of land benefited by the cleaning out, widening, and deepening of the drain.

Among the parcels so assessed was the E. half of the N. W. fractional quarter of section 4, town 4 S., of range 10 E., containing 86 acres, then belonging to the defendant, Francis M. Eastwood. The amount apportioned to and assessed thereon by the drain commissioner was $80. This assessment appears to have been made by the drain commissioner on the 1st day of July, 1884, and was extended by the supervisor upon the general tax roll of the township for the year 1885.

On the 8th day of September, 1885, Francis M. Eastwood sold to the plaintiff, James A. Lindsay, and conveyed to him by warranty deed, the south 52¼ acres of the aforesaid 86 acres, describing it by metes and bounds. After the sale defendant paid to the township treasurer, who had the tax roll for the collection of the ditch tax aforesaid, two-fifths of the $80 assessed upon the 86 acres; intending thereby to pay what was his proportionate share of such tax. Upon this roll the whole E. ½ of the N. W. ¼ was assessed to defendant, Eastwood, and the whole of the ditch tax was levied and assessed thereon.

When plaintiff went to the treasurer to pay his taxes of 1885, he found that $48 of the ditch tax remained

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unpaid, and requested the defendant to pay the same, but he refused to do so. Plaintiff thereupon paid such balance of ditch tax, and brings this suit to recover it back from defendant. Plaintiff claims that the ditch tax was an incumbrance upon the land at the time he purchased and received his deed from defendant, and that defendant was in duty bound to pay and discharge the same.

On the other hand, defendant claims that the ditch tax did not become a lien upon the land until after the 8th day of September, 1885, and then only by virtue of the general law, which makes taxes a lien from and after the first Monday of December in the year they are levied.

The statute[1] under which this ditch tax was assessed declares:

"The taxes assessed upon any lands under the provisions of this act shall be, and are hereby, declared to be a perpetual lien upon such lands, to remain such until such taxes, with all lawful costs, interest, and charges, are fully paid, or otherwise legally discharged."

The question presented is, when do such taxes become a lien upon the land? We are of opinion that they become a lien as soon as they become a charge on the land, by the assessment of benefits made by the drain commissioner. The statute requires this officer to make an apportionment of the cost of construction, over and above that properly assessed upon the municipality, to the lands to be benefited by such drain, according to the sum of the assessment of benefits on each description which shall accrue to any piece of land by reason of the construction of such drain. He is also required to assess the amount of benefits so apportioned upon the respective parcels of land, and this assessment is subject to review by the

[1] How. Stat. § 1716.

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commissioner upon the request of any parties in interest. He is to make a list showing such apportionment, and serve a copy thereof upon the supervisor of the township against which any sum is assessable; and thereupon it becomes the duty of the supervisor to levy and assess the sum so apportioned against such lands as are contained in the list, and extend the same upon the general tax roll of his township.

Under the statute, the assessment is made by the drain commissioner, and the action of the supervisor is merely ministerial, for the purpose of collection. He has no authority to change or modify such assessment, nor to review it in any manner. The duty which the supervisor performs is to levy the amount assessed by the drain commissioner upon his tax roll, and the statute further provides for the manner in which it shall be collected. The statute denominates these benefits assessed as taxes, and declares them to be a lien on the land from the time they are assessed. A mere delay of the drain commissioner to present the assessment list to the supervisor, or of the supervisor in extending it upon the tax roll, does not invalidate the lien.

The facts of this case show that the ditch tax in question was a lien and incumbrance upon the land sold by defendant to plaintiff at the time he conveyed it by warranty deed to him. The circuit judge held that as the tax could not be paid until it was spread upon the assessment roll in December, 1885, and the conveyance to plaintiff was in September previous thereto, it was not a lien upon the land when the deed was made. For the reasons above stated we think the circuit court erred. The fact that the lien could not be discharged until after the deed was given would not determine whether the incumbrance existed or not. A mortgage not due at the

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time of a conveyance is an incumbrance, although it cannot be paid and discharged until after the sale.

The judgment must be reversed, and a new trial ordered.

The other Justices concurred.

HYMAN SUTTON v. GEORGE J. LAMB.

Bills and notes—Payment—Statute of limitations—Contract of sale—Passing of title.

Where the payor in certain notes agreed with the payee to send him at a designated place certain goods, on which the payee was to pay the freight, and indorse a given sum on the notes, the sale is complete on receipt of the goods, at which date the payor is entitled to have the indorsement made.

Case made from Eaton. (Hooker, J.) Argued October 4, 1888. Decided November 1, 1888.

Assumpsit. Plaintiff brings error. Reversed, and judgment entered for plaintiff for an increased amount according to the opinion. The facts are stated in the opinion.

George W. Mead, for appellant, contended:

1. The transaction is to be regarded as one for the benefit of the debtor, and the rules of construction and presumptions are in many respects exactly contrary to those governing ordinary sales, citing Chipman, Cont. 26, 35; 1 Poth. Obl. Art. 3, 497; 2 Kent, Com. 506; Broom's Legal Maxims, 630.
2. In the case of a contract of sale, the delivery is to be at the place where the vendor has the article, but, in case of a contract to pay a debt in specific articles, the weight of authority would seem to be in favor of the rule that the property was

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to be delivered at the creditor's place of residence; citing 2 Kent, Com. 506, and cases cited; Chipman, Cont. 29, 30; 2 Pars. Cont. 646; *Railroad Co. v. Nutting*, 15 Gray, 25.

3. In case of a note payable in portable chattels, without specifying the place of payment, the debtor must pay and deliver at the creditor's residence; citing *Goodwin v. Holbrook*, 4 Wend. 377; *La Farge v. Rickert*, 5 Id. 187.

Ralph E. Stevens, for defendant, contended:

1. To properly construe the contract, it must be read in the light of all of the circumstances having any bearing upon the subject when it was made; citing *Spaulding v. Coon*, 50 Mich. 622; *Ferris v. Wilcox*, 51 Id. 105.

2. The execution of the contract operated as a payment of $50 upon the notes upon the day it was made, at which time the plaintiff was bound to make the indorsement; citing *Burchard v. Frazer*, 23 Mich. 224.

3. An agreement to take certain articles in existence toward the payment of a note operates as a payment, for the purposes of the statute of limitations, from the time of the agreement; citing 7 Wait's Act. & Def. 303; *Lincoln v. Johnson*, 43 Vt. 74; 2 Pars. Cont. 684.

LONG, J. This cause was tried at the October term, 1887, of the circuit court for the county of Eaton, before the court without a jury, and the court found the following facts and conclusions of law:

"1. On the 9th day of April, A. D. 1879, the defendant made and delivered to the plaintiff his three promissory notes,—one for $100, and one for $200, both payable one year from date; and one of $200, payable two years from date. All drew interest at the rate of ten per cent.

"2. The consideration for said notes was the right of one-half of the State of Michigan in a patent fence.

"3. On the 30th day of August, A. D. 1880, the plaintiff, then living at the town of Scruple, Oswego Co., N. Y., made a further contract with the defendant, then living at Sunfield, Eaton Co., Mich., by the terms of which it was agreed that the defendant should send to the plaintiff two good vibrator harrows, made at Kalamazoo, Mich., providing he could get the same, and, if not, one twenty-tooth Lansing harrow, and one twenty-tooth

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Kalamazoo spring-tooth harrow, to be sent to Central Square, Oswego Co., N. Y.; plaintiff to pay the freight on the same, and indorse fifty dollars on the notes in controversy. It was further agreed that the defendant was to have further rights in the sale of territory for said fence, on conditions stated in the contract, which was in writing.

"4. In pursuance of this contract, the defendant shipped at Vermontville, Eaton Co., Mich., two harrows, viz., one vibrator harrow and one Lansing harrow, though he admitted at the trial that he had, and could have sent, two vibrators, had he been disposed to do so. These harrows were shipped to the plaintiff's address,—Central Square, Oswego Co., N. Y.; the first being sent September 9, and the other September 20, 1880.

"5. These harrows came to the possession of the plaintiff on the 5th of October, 1880; and on the same day he indorsed $20 upon each of the $200 notes, and $10 on the $100 note.

"6. No subsequent or other payment was ever made on said notes or either of them.

"7. The amount due upon said notes is as follows (indorsements being deducted), viz.: On the $100 note, $175.83; on the $200 notes, the sum of $351.66 each,—total, $879.15.

"8. This action was commenced September 22, 1886.

"9. By the ordinary mode of freight traffic the said harrows would not reach Central Square, Oswego Co., N. Y., in less than six days from the date of shipment."

Upon the foregoing facts being found, the court delivered its opinion of the law as follows:

"1. The consideration for the notes was valuable, and the notes were valid.

"2. The contract of August 30 was based on a valuable consideration, and was a valid contract.

"3. The shipment of the harrows not being in accordance with the terms of the contract, the plaintiff might accept the same as payment or not, as he chose.

"4. Part payment takes the claim out of the operation of the statute of limitations only where made under circumstances that warrant the inference of a new promise to pay the debt.

"5. In this case the shipment of the harrows under

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the contract of the parties was the significant act from which the new promise is to be inferred; and neither the promise nor the time can be deferred by the act of the plaintiff. The payment, if made under the terms of the contract, was complete at the time the goods were shipped; and though, in view of the fact that the goods sent were not in compliance with the contract, the plaintiff was under no obligation to receive the same, if he chose to do so, then it must be treated as a compliance with this contract, and the delivery complete when the goods were shipped. That was the kind of payment the defendant attempted to make, and the time he attempted to make it; and the new promise must be inferred from his acts, if at all, and not by a subsequent acceptance by the plaintiff.

"6. The two notes payable in one year are therefore barred by the statute. Upon the other the plaintiff should recover a judgment of $351.66, and costs to be taxed."

The contract referred to in the third finding of fact reads as follows:

"This agreement, made this 30th day of August, in the year 1880, between George J. Lamb, of Sunfield, Eaton Co., Mich., and H. G. Sutton, of Scruple, Oswego Co., N. Y., witnesseth that the said George J. Lamb agrees to send to the said H. G. Sutton two good vibrator harrows, made at Kalamazoo, Mich., provided that the said Lamb can get them; if not, one twenty-tooth Lansing harrow, and one twenty-tooth Kalamazoo spring-tooth harrow, in lieu thereof; to be sent to Central Square, Oswego Co., N. Y. And the said Sutton is to pay the freight on the same, and indorse fifty dollars on notes now held by said Sutton against the said Lamb.

"And on these conditions the said Sutton agrees to grant unto the said Lamb the right to sell territory for Todd's portable fence, on the following conditions: The said Lamb is not to sell any state for less than two hundred and fifty dollars, and as much more as he can get; to be in good money, or the equivalent. And the said Lamb is to have all over one hundred and fifty dollars for his share, to be applied on the notes now held by the said Sutton against the said Lamb. And the said Sutton is to furnish a good and sufficient deed for the same.

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And the said Lamb can sell any state west and south of New York not previously sold.

"Signed and sealed on the day and year above written.

"GEORGE J. LAMB. [Seal.]
"H. G. SUTTON. [Seal.]

"And it is further agreed between Sutton and Lamb that, if the said Lamb can sell any county in any state aforesaid, he is to have one-half of the proceeds for making the sale, to apply on above-named notes until paid; and townships in like proportions.

"GEO. J. LAMB.
"H. G. SUTTON."

The plaintiff, on December 7, 1887, filed written exceptions to said findings. Judgment was entered in the cause, in accordance with the conclusions of law, in favor of plaintiff, for the sum of $351.66. Plaintiff, claiming that he was entitled to the full amount of all the notes and interest, brings the case to this Court by writ of error.

The *only* question arising in the case is upon the construction of this contract for the sale of the harrows, and that as to the time when the sale was completed, so that the defendant was entitled to credit for the amount of the purchase price of $50, to be indorsed upon the notes. The court seemed to be of the opinion that there was a delivery as soon as the harrows were put on the cars at Vermontville, Eaton Co., Mich., and that the amount should have been credited upon the notes as of those dates, September 9 and September 20, 1880, and, if the amount had been so credited as payment, more than six years would have elapsed from those dates to the time the suit was commenced; and that the action as to the two notes due one year from date would have been barred by the statute; and following this view held the two notes barred.

In this the court was in error. The contract itself settles this question. It provides that the harrows were—

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"To be sent to Central Square, Oswego Co., N. Y.; and the said Sutton is to pay the freight on the same, and indorse fifty dollars on the notes."

The only reasonable construction that can be given to this language is that, upon the receipt of the harrows, Sutton was to pay freight, and then indorse the $50. This indorsement was not to be made until the harrows were received at Central Square. The court finds the fact that the harrows came to the possession of the plaintiff on October 5, 1880, and that the indorsements were made on the three notes as of that date. It cannot be said that defendant was entitled to this indorsement at an earlier date.

Some stress is laid by counsel for defendant upon the fact that the harrows shipped did not correspond to the harrows described in the contract; and the plaintiff, for that reason, having the option to receive or reject them, and having determined to receive them and make the indorsement, it was his duty to make it as of the date of the contract, instead of the day they came to his possession. There is no force in this suggestion. It could not change the contract as to the *time* when the indorsement was to be made. They were sent by the defendant on the basis of the contract, and accepted by the plaintiff in the same way.

Counsel for defendant now makes claim that the indorsement should have been made on the date the contract was entered into, to wit, August 30, 1880; that the contract operated as a payment on the notes on the 30th of August, 1880, when it was executed, and the shipment of the harrows was simply a payment on that contract, and not on the notes.

This might have been true if the contract had so provided. The agreement was that defendant was to send plaintiff two good vibrator harrows, made at Kalamazoo,

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Mich., provided defendant could get them. If not, he was to send one twenty-tooth Lansing harrow, and one twenty-tooth Kalamazoo spring-tooth harrow, in lieu thereof. These articles were to be sent to Central Square, N. Y.; plaintiff to pay freight, and make the indorsements on the notes. Payment of freight could not be made until the articles arrived at their place of destination; and the plain intent of the parties, by the terms of the contract, was that *then* the indorsement was to be made. This contract was not intended to operate as a payment on the notes; but the articles themselves, when received, were to be taken at the price of $50, and that amount then indorsed. In any view of the case, the court was plainly in error in holding the notes barred.

The court found the amount due on the three notes for principal and interest at the date of the judgment, November 21, 1887, after deducting indorsements, to be $879.15. Judgment should have been rendered in favor of plaintiff for that amount.

The fifth and sixth conclusions of law of the court below, barring the two notes, must be reversed, and judgment in this Court rendered for $527.49, with interest at 10 per cent. from November 21, 1887, and costs of this Court.

The other Justices concurred.

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BENJAMIN WOODEN v. GEORGE W. WOODEN AND JENNIE WOODEN.

Fraudulent conveyances—Husband and wife—Voluntary deed—Evidence—Payment of taxes by grantor—Recording laws.

1. It is well settled in this State that a wife has a right to bargain with her husband for any amount due her from him, and may take a deed directly from him in settlement of such claim. *Hyde v. Powell*, 47 Mich. 156; *Bank v. McAllister*, 46 Id. 397; *Allen v. Antisdale*, 38 Id. 229; *Loomis v. Smith*, 37 Id. 595.
2. It was held in *Dull v. Merrill*, 69 Mich. 49, that a wife will not lose her rights as a creditor of her husband by failing to make her claim known, even as against a party who trusted the husband in ignorance of such claim.
3. A voluntary conveyance is not void as to creditors, even though the grantor is indebted at the time, if he retains ample means to pay his debts. *Bank v. Whittle*, 48 Mich. 1.
4. The object of the registry law is to protect *bona fide* purchasers, and a failure to record a deed will not divest the grantee of his rights except as to a *bona fide* purchaser or incumbrancer.
5. In a suit to set aside a deed by a husband to his wife as fraudulent as to creditors, the fact that the land was assessed to the husband for several years after the execution of the deed, and while it was unrecorded, can have no weight, it appearing that he attended to his wife's business affairs, and paid the taxes from the products of the land.

Appeal from Kalkaska. (Failass, J.) Argued October 5, 1888. Decided November 1, 1888.

Bill in aid of execution. Defendants appeal. Decree reversed and bill dismissed. The facts are stated in the opinion.

William D. Totten (*J. L. Boyd*, of counsel), for complainant.

Willis B. Perkins, for defendants.

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LONG, J. The bill was filed in this cause in aid of an execution issued out of the circuit court for the county of Kalkaska, upon a judgment rendered therein in favor of the complainant, and against George W. Wooden, the above-named defendant, and to set aside a deed to the S. E. ¼ of section 26, township 28 N., of range 6 W., in said county, made by said defendant George W. Wooden to his wife, Jennie Wooden, on August 4, 1881.

The substantial allegations in the bill are, that in November, 1880, the defendant George W. Wooden was indebted to the complainant in the sum of $152, and on January 27, 1886, a judgment was rendered in the circuit court for Kalkaska county against him, in favor of complainant, for $207 and costs, being said sum of $152, with accrued interest thereon; that on the day said judgment was so rendered a stay of proceedings for 30 days was obtained by defendant, and that on February 23, 1886, and during said stay, a deed from George W. Wooden to his wife, Jennie, to the lands above described, was placed upon record in the office of the register of deeds of said county, and which deed then purported to be made, executed, acknowledged, and delivered to the grantee therein on August 4, 1881; that George W. Wooden in the month of November, 1880, was the owner in fee-simple of said lands, and was also the owner in fee-simple of the S. ½ of the N. E. ¼ of section 26, township 28 N., range 6 W., and of lot 33, block H, of the village of Kalkaska.

It is also alleged in the bill that on February 8, 1886, and during the time of said stay, the defendant George W. Wooden made and executed to himself and wife, as joint tenants, a deed of the property on section 26 and lot 33, in block H; that these conveyances by defendant George W. Wooden were made for the purpose of hindering and delaying and defrauding his creditors.

That on March 1, 1886, complainant caused an execu-

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tion to be issued upon said judgment, and placed in the hands of the under-sheriff of said county, and levied the same upon the lands first herein described, and caused notice of such levy to be filed in the office of the register of deeds of said county; that said George W. Wooden has no personal estate from which the amount of said execution could be satisfied, and no real estate except the lands herein first described, and that he neglects and refuses to pay said amount, or any part thereof; and that there is actually and equitably due complainant upon said judgment, for principal and interest and costs, the sum of $247.20 over and above all claims and set-offs.

It is alleged that the pretended sale of said lands to Jennie Wooden is a sham, and made with intent to cheat and defraud complainant out of his said judgment, and that said Jennie Wooden had no money or means to pay for the same, and that said lands during the years 1881 to 1885, inclusive, were assessed to said George W. Wooden; and complainant prays that said deed be set aside, and the sheriff be permitted to make sale of said premises to satisfy his demand.

On the part of the defendants, it is admitted that prior to August 4, 1881, the defendant George W. Wooden was the owner in fee of the lands first described, and that up to and until February 23, 1886, the record title to the S. ½ of the N. E. ¼ of section 26, township 28 N., range 6 W., and lot 33 of block H of the village of Kalkaska, was in the defendant George W. Wooden, and that on August 4, 1881, the defendant George W. Wooden gave the warranty deed to the defendant Jennie Wooden, as alleged, and that the same was duly recorded February 23, 1886; that said lands were assessed to George W. Wooden for the years 1881 to 1885, inclusive, and that on February 8, 1886, George W. Wooden made to himself and

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wife, as joint tenants, a deed to the other real estate described, then owned by him.

But defendants insist that the conveyance of 1881, which is the only one in question in this controversy, was not fraudulent, but was made pursuant to a *bona fide* sale, and for a valuable consideration; and also that, at the time the same was given, the defendant George W. Wooden was the owner of personal and real estate more than sufficient to satisfy all his then existing legal indebtedness.

The case was heard before Judge Fallass, of said circuit, and decree entered therein September 30, 1887, setting aside said first-mentioned deed of August 4, 1881, and authorizing the sheriff of said county to proceed to a sale of the premises under said execution. From this decree the defendants appeal.

The testimony was taken in open court. The defendant George W. Wooden is the son of complainant. The whole question in this case hinges upon the good faith of the transaction of August 4, 1881. If the deed of the lands in controversy was made for a valuable consideration, and in good faith, in the payment of an honest and *bona fide* indebtedness, the complainant has no standing in this Court, and the deed must be held valid.

If the fact of George W. Wooden's insolvency is established by the proofs, it can only have a bearing on the question whether or not the deed was given in good faith, and for a valuable consideration. The judgment establishes the fact of the indebtedness of George W. Wooden to complainant, and that indebtedness continued upon such judgment, unless it was canceled by a settlement made between the parties after it was taken in the circuit court.

Some claim is made by defendants that on August 1,

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1881, three days prior to the making of the deed, a settlement was made between the parties, and in which settlement George turned out to his father a portion of a stock of goods then held jointly by himself and wife in satisfaction of all claims then held by complainant against him, and which included the claim upon which the judgment was afterwards rendered, and by virtue of which the levy under the execution was made upon the lands in controversy. This is denied by complainant. Suit was afterwards brought upon that claim, and proceeded to judgment. Defendant appeared in that case, and contested it, and the judgment so taken must be held conclusive.

At the time the deed was made, the complainant had and held a valid claim against George W. Wooden, which afterwards was put into judgment against him, and as a judgment creditor the complainant has a right to attack the *bona fides* of the transaction in the giving of the deed of August 4, 1881.

Defendants claim, and testimony was given on the hearing tending to show the fact, that on or about April 6, 1880, the defendant George W. Wooden and his father-in-law, Albert T. Kellogg, purchased jointly a stock of groceries of Mr. Tyler, of Kalkaska, paying therefor the sum of $750, George contributing $350, and Kellogg, $400; and that immediately after the purchase Kellogg gave to his daughter, Jennie Wooden, defendant, his interest in said stock and business. Kellogg soon after purchased, and put into said business, several articles used in connection with the business, valued at $100, and also gave these to his daughter. George W. Wooden and Jennie, his wife, continued in this business together—though carried on in the name of George W.—up to August 4, 1881, when Jennie sold to her husband her entire interest in the stock and business of the concern,

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which interest was valued at the sum of $715; in consideration of which, George W. Wooden deeded her the real estate first herein described, being the property upon which the levy was made under the execution. It is this deed which was set aside by the court below.

The complainant on his cross-examination, when his attention was called to this transaction, stated that he did not know anything about it, and did not know whether Mr. Kellogg gave his daughter the stock of groceries, and did not know whether or not it was turned out to his son, as testified by him and his wife. There is no proof in the case showing, or tending to show, that the transaction was not as claimed by defendants. The real estate deeded was valued at $800, and no claim is made that it exceeded that amount in value or that these goods were not worth the amount at which they were turned out.

It is well settled in this State that a wife has a right to bargain with her husband for any amount that may be due her from him, and may take a deed directly from him in settlement of such claim. *Hyde v. Powell,* 47 Mich. 156 (10 N. W. Rep. 181); *Bank v. McAllister,* 46 Id. 397 (9 N. W. Rep. 446); *Allen v. Antisdale,* 38 Id. 229; *Loomis v. Smith,* 37 Id. 595.

This same question was before this Court in the recent case of *Dull v. Merrill,* 69 Mich. 49 (36 N. W. Rep. 677). The bill in that case was filed by Mrs. Dull to set aside certain levies made by defendant upon real estate which had been deeded her by her husband. In that case it was said:

"Complainant could not lose her rights as a creditor of her husband by failing to make her claim known, even as against defendant, who trusted him in ignorance of it."

It is contended by complainant's counsel that the fact

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appearing that the deed was not placed upon record till after the judgment was obtained, and during the stay allowed by the court, taken in connection with the fact that the land deeded, for the years 1881 to 1885, inclusive, was assessed to George W., was some evidence of fraud; and when coupled with the fact, which complainant claimed to have proved, that defendant George W. Wooden was insolvent at the time of the execution of the deed, it is conclusive of a fraudulent intent. We are not satisfied, however, that the evidence shows that George W. Wooden was insolvent at the time of the execution of this deed. He was the owner of this land, valued at $800, and in addition had then the other lands subsequently conveyed, valued at $800; another house and lot and building materials, valued at $625; the stock in the store, and credits, valued at $1,500,—making some $3,725 worth of property possessed by him, while his indebtedness is only shown to be at that time something like $1,600.

It is well settled that even where a voluntary conveyance is made by a person who may be indebted at the time, but who is neither embarrassed nor insolvent, and who retains ample means to pay his debts, it is not void against existing creditors. *Bank v. Whittle*, 48 Mich 1 (11 N. W. Rep. 756). The fact that the deed was not sooner recorded would not make it fraudulent. The object of the registry laws is to protect *bona fide* purchasers, and the fact that it was not recorded would not divest the grantee of her rights, except as to a *bona fide* purchaser or incumbrancer.

That the property was assessed during these years to the husband can have no weight. It appears that he attended to his wife's business affairs, and that the taxes were paid from the products of the land. There is noth-

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ing in the case showing that the deed in question was not valid when given. It was founded on a sufficient consideration, actually paid to George W. Wooden. Jennie Wooden paid nearly, if not quite, its full value, in property, which her husband took in exchange for these lands, and, even if this conveyance might hinder and delay or entirely defeat creditors in the collection of their debts, it could in no manner render such conveyance void. The fact that George W. Wooden made a conveyance of these other lands to himself and wife in 1886, jointly, can have no bearing upon the *bona fides* of the transaction in August, 1881. The deed was valid then, and must be held valid now.

The whole controversy is an unfortunate one. It is between these defendants and their father, an old man upwards of 72 years of age. His claim under his judgment seems to be fully established, and no part of it paid. His claim appeals strongly to a court of equity, and relief would be granted against George W. Wooden if the same could be given without interference with the vested rights of Jennie Wooden in these lands. The bill is filed in aid of execution, and not as a judgment creditors' bill to reach choses in action in the hands of third parties.

The decree of the court below must be set aside, and a decree entered here dismissing complainant's bill, with costs of both courts.

The other Justices concurred.

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JAMES B. THOMAS v. THE CHICAGO & GRAND TRUNK RAILWAY COMPANY.

Railroad companies—Freight trains—Permit to passenger—Ejection by conductor—Pleading—Declaration—Variance.

1. A railroad company has a right to prohibit passengers from riding on freight trains, or to prescribe the conditions on which they may ride.
2. A rule adopted by a railroad company forbidding conductors of freight trains from receiving or taking fare from any person traveling on their trains, or from allowing any person to travel as a passenger without the written order of the superintendent or assistant superintendent in charge of the district, except on such way freight trains as are printed in time-tables, is a reasonable one, and within its power to prescribe.
3. In such a case it is the duty of the conductor to cause a passenger to leave his train if attempting to ride without such permit, and he is not to be governed in his action by any arrangement the passenger claims to have made with the ticket agent, where the ticket purchased only entitles him to ride on passenger trains.
4. It is well settled that one cannot sue for the breach of one duty, and recover for the breach of another.

   So *held*, where plaintiff sued a railroad company for being ejected from a train through the fault of the conductor, and the case was submitted to the jury on the theory of a misdirection by the agent who sold him a ticket, with the agreement that he could ride on said train with said ticket.

Error to Genesee. (Newton, J.) Argued October 11, 1888. Decided November 1, 1888.

Case. Defendant brings error. Reversed. The facts are stated in the opinion.

Geer & Williams (*E. W. Meddaugh*, of counsel), for appellant, contended as stated in the opinion, citing the authorities therein cited.

Frank B. Leland, for plaintiff.

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LONG, J. This action was brought in the Genesee circuit court by plaintiff to recover damages claimed to have been sustained by him by being put off defendant's freight train, just east of the city of Flint, on September 3, 1887. On the trial the plaintiff recovered judgment for $100. Defendant brings error.

Plaintiff's claim in his declaration is that on September 3, 1887, about half-past 10 o'clock in the forenoon, he purchased from the authorized agent of said defendant at Flint, and paid the price demanded therefor, a ticket called a "Week's-end" return ticket, which by its terms entitled him to ride upon any train he might elect, running from Flint to Port Huron upon said road on said day, on which ticket is indorsed, with a mark calling special attention thereto, "Good going on any train Saturday," said day being Saturday, as aforesaid; and said plaintiff was directed by said ticket agent of said company to get aboard a train which would be at said station at Flint in about 10 minutes, and going, as said plaintiff was informed by said agent, to the city of Port Huron, as aforesaid.

That said plaintiff got aboard of said train, and sat down. When about a mile and one-half or two miles from said station at Flint, the conductor of said train asked plaintiff for his fare, and was tendered plaintiff's said ticket. The conductor then demanded a permit from plaintiff, and was informed that he had none, and that he needed none, as his ticket gave him especial permission to ride on all trains running from Flint to Port Huron on that day. The conductor then became abusive, and, checking the speed of the train, he wrongfully, unlawfully, and uproariously ordered plaintiff off said train. Plaintiff refused to get off, and became greatly excited, fearing a conflict with said conductor and trainmen, employés of said railway company, and there-

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upon said conductor wrongfully, unlawfully, outrageously, and blasphemously ordered plaintiff to get off said train immediately, while it was still in motion; and said plaintiff was finally compelled to get off said train while it was still in motion, doing so only to avoid a conflict with the conductor and other employés of said company; and said plaintiff, being sick and unable to walk, was compelled, on account of his unlawful expulsion from said train, to carry his baggage back to said city of Flint; and plaintiff was greatly injured in his mind, his body, and his general health by said wrongful expulsion, etc.

Plaintiff testified in his own behalf upon the trial, and his claim there made was that on September 3, 1887, he went to the ticket office of defendant in the city of Flint, and inquired if there was a train going to Port Huron before 7:55 on that evening. Being advised by the station agent that there was, he called for and purchased a week's-end return ticket to Port Huron. This was on Saturday. After purchasing and paying for said ticket, the station agent then said to him:

"All I have to do is to give the conductor of this freight train a permit, and make her a passenger train. * * * I am going to give the conductor a permit."

Plaintiff testified further that he then left the depot, went outside, and waited about three-quarters of an hour, when the train came along; that another commercial traveling man was with him; that they then saw the conductor, boarded the train, left their baggage, went out for a lunch, and on their return the conductor, standing on the back of the car, beckoned them to hurry up; that they then got into the car, and the train started.

After the train had got under way, the conductor came and demanded their tickets, which were given him, and he then asked for the permits. They then told the conductor the station agent said he would give the conductor

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permits for them to ride on this train. The conductor said they could not ride. Plaintiff then testified:

"I told him I would ride with him. I had bought that ticket, and paid for it, and was going to Port Huron. The conductor said we could not ride, checked the train down, and ordered us off. * * * We got off about one mile from the station."

Upon his cross-examination the plaintiff was asked:

"*Q.* Why didn't you ask the conductor if the agent had given him a permit?

"*A.* Because it was not my place to.

"*Q.* Didn't you want to know?

"*A.* I bought my ticket from the official of the road, from the agent, and he told me,—I had a right to rely upon what the agent told me,—that the ticket was a first-class ticket on that train; that I could ride on that train. The agent told me he would give the conductor a permit. I told the conductor what the agent told me about giving him a permit. The conductor told me he could not carry me if I didn't have a permit. He told me I would have to get off that train. * * *

"*Q.* Did he not tell you, according to the rules and regulations of the company, no man could ride on these through freights without a permit?

"*A.* Yes, sir."

It further appeared from the plaintiff's testimony that after being put off this train, and returning to the depot, he saw the operator, who told him another through freight would be along in a few minutes, when a permit would be got for him, and he could ride upon that to Port Huron. Plaintiff refused this offer, and demanded that he be given a permit, and put on a yard-engine standing there, and carried over the road till the train from which he had been ejected was overtaken, and then put aboard that train, and permitted to ride to Port Huron.

It will be seen the claim made in the declaration is that the conductor wrongfully and unlawfully ejected him from the train upon which he lawfully might ride, for the reason that he had a ticket good on any train; charg-

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ing the defendant with the misconduct of the conductor in unlawfully ejecting him while he was in possession of a ticket which entitled him to ride on that train. His declaration is formed upon the theory that his ticket entitled him to ride on the through freight train without a permit, and that the conductor wrongfully compelled him to get off. The ticket was produced on the trial, and reads as follows:

"Chicago & Grand Trunk Railway. Week's-end Excursion Ticket. Mr. J. B. Thomas. From Port Huron to Flint. Only for one continuous trip each way, and is not transferable. Good going on any train Saturday, September 3, 1887, and return not later than Monday, September 5, 1887. It will not be good to return on date of issue. This ticket will not be good for return passage unless presented by the person whose signature appears below, and unless the purchaser's signature is reproduced in the presence of the conductor in space provided on back hereof. No stopover allowed.

"W. J. SPICER, General Manager.

"I fully understand and agree to the above contract.

[Signed] J. B. THOMAS.

"Form C—X—20.

"Chicago & Grand Trunk Railway. Week's-end Excursion Ticket. From Flint to Port Huron, on conditions named in the contract. Not good if detached.

"Form C—X—20."

It appeared upon the trial that the defendant company had adopted a rule, No. 167, which was in force on September 3, 1887, and which reads as follows:

"No conductor in charge of a freight train shall receive or take a fare from any person traveling on his train, nor shall he allow any person to travel as a passenger without the written order of the superintendent or assistant superintendent in charge of the district, except such way freight trains as are printed in time-tables."

The train from which plaintiff was put off was No. 27, and a through freight. It was not on the published time-table. It was not a train that carried passengers

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without a permit, such as is provided for in the above rule. These facts were known to the conductor at the time he put plaintiff off the train. This ticket did not entitle the plaintiff to ride on the train in question. It was not a way freight, and was not printed in the time-tables as a train upon which passengers would be carried. The rule adopted by the company was a reasonable one, and within its power to prescribe.

The ticket held by plaintiff only entitled him to ride upon passenger trains. The words in the ticket, "Good going on any train Saturday, September 3, 1887," had reference to trains used in the carriage of passengers, and the permission to ride on a through freight could only be granted by the superintendent or assistant superintendent in charge of the district. This permission the plaintiff did not hold, and it is not pretended that any such permit was given. The defendant company had the right to prohibit passengers from riding on freight trains, or to prescribe the conditions on which they might so ride. *Railroad Co. v. Rose*, 11 Neb. 177 (8 N. W. Rep. 433).

It was the duty of the conductor to cause a passenger to leave the train if he was attempting to ride without having obtained the permission of the superintendent or assistant superintendent in charge of the district, and the conductor is not to be governed in his action by any arrangement the passenger claims to have made with the ticket agent, under the circumstances here shown. The defendant was not bound by any law, statutory or otherwise, to carry passengers on its trains for the transportation of freight. The plaintiff's right to ride upon the train in question could only be acquired by complying with rule 167. No pretense is made that he has done so, and the fact that the station agent of defendant promised to give the conductor the permit does not aid the cause set out in his declaration. *Frederick v. Railroad Co.*, 37

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Mich. 343; *Marshall v. Railroad Co.*, 78 Mo. 616; *Railroad Co. v. Kennedy*, 3 Amer. & Eng. R. Cas. 467.

The cause of action set out in the declaration, however, is not the cause of action upon which plaintiff prevailed at the trial. The declaration was framed upon the *theory* that he had a right to ride upon a through freight train without a permit, and he bases his right to recover on the assumption that the conductor wrongfully expelled him. The claim made upon the trial was that the ticket agent agreed, when he sold him the ticket, that he would give the conductor a permit for him to ride upon that train, and that the station agent directed him to take that train, and that he did take it because of the direction so given by the station agent. The station agent positively denies giving any such direction, but says he sold him the ticket, and told him he would try and get him a permit to ride on that train, and he must come to the station and get it before the train left; that he had to telegraph to Battle Creek, to the assistant superintendent, for it. No claim is made by plaintiff that he did call upon the station agent after purchasing his ticket to get the permit, but he claims that he relied upon the agent giving such permit to the conductor.

The court, upon this testimony, charged the jury that—

"This ticket produced in evidence is a ticket for transit on a passenger train, and under this ticket alone the plaintiff would have no right to travel on a freight train. It could only be used by the direction and permission of the railway company, given by Mr. Bowker, its agent, and a special contract to do so, agreed to by both parties. I further charge you that the burden of proof is on the plaintiff to satisfy you, by a preponderance of evidence, that the agent directed him to take that train, and to use this ticket thereon; and, if you are so satisfied, you will find for the plaintiff."

The case was submitted to the jury upon this theory,

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and upon no other. This was not the claim made by the declaration. It is well settled that one cannot sue for the breach of one duty, and recover for the breach of another. Plaintiff alleges in his declaration that the ticket agent told him to get aboard the freight train, but makes no claim that such direction was not correct and proper, but, on the contrary, asserts that it was, and that no one was in fault but the conductor. On the trial the case was submitted to the jury on the theory that the agent did misdirect him, and sold him the ticket with the agreement that he could ride on that train with the ticket then purchased. In the declaration the allegation is that the conductor was in fault. On the trial the claim is made that the station agent was in fault. This was a fatal variance, and the plaintiff had no right to recover.

Defendant's counsel requested the court to charge the jury in his fourth request that—

"The conductor on the train in question had the right to require the plaintiff to procure and produce, when requested, a permit from the proper officer of the defendant company, entitling him to a passage on said train, and, upon plaintiff's failing and refusing to procure and produce the same when requested to do so by the conductor in charge of said train, said conductor had the right to insist that the plaintiff should get off from said train, and for which expulsion from said train defendant in this case is not liable."

This request was a proper one, and, under the circumstances here stated, should have been given by the court. The claim set out in the declaration had not been substantiated by the proofs; and the conductor, as found and as charged by the court, was in no fault. The ticket itself did not entitle plaintiff to be carried there. No permit was produced, and plaintiff was properly expelled from the train. If he had a cause of action against the com-

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pany for a breach of contract in the purchase of his ticket, made with the station agent, he should have so stated in his case in his declaration. Not having so stated it, he was not entitled to recover under this declaration.

The judgment of the court below must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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JOSEPH L. HUDSON AND CAMPBELL SYMINGTON v. MARY C. ROOS.

[See 76 Mich. 173.]

Sale—Sample—Particular purpose—Latent defects—Return of property—Findings of fact.

1. A vendee who discovers a *latent* defect in an article purchased by sample, and for a particular purpose, known to the vendor, after its delivery, may return it to the vendor.
2. The Court reverse the judgment in this case for want of necessary findings of fact, treating it as a mistrial.

Error to Wayne. (Gartner, J.) Argued October 12, 1888. Decided November 1, 1888.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

Larned & Larned, for appellant.

H. C. Wisner, for plaintiffs.

MORSE, J. This case was tried before Hon. George Gartner, one of the circuit judges of Wayne county, on the 11th of June, 1888, without a jury. The court filed

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written findings of fact, and entered judgment in favor of the plaintiffs for $208.28 and costs.

The first error assigned is this: The cause had regularly been assigned, according to the practice of the court, for trial as a jury case on the 8th day of June, 1888. When that day arrived the defendant's counsel was engaged in the recorder's court, in a criminal trial. The court refused to hold the case open until defendant's counsel was at liberty from the criminal trial. The counsel thereupon, to prevent the case going by default, consented to try the case on the following Monday, June 11, without a jury, not waiving their objection to the refusal of the court to hold over or adjourn said cause until counsel was disengaged from the case then on trial in the recorder's court. Neither did they waive their right to a jury trial. This is the claim of the facts set out in the brief of defendant's counsel of the proceedings on the 8th of June.

We must be governed by the bill of exceptions. The bill states that the case was assigned for jury trial, June 8, 1888; that on that day defendant's counsel was engaged in the recorder's court, in the trial of *People v. Margaret Harrison*, for a felony; that, on the calling of the case, the court, *on application of defendant's counsel*, set said case down for trial by the court June 11, 1888. No record of any application to have the case held over or adjourned, nor any refusal of the court to do so, appears, and no objection to a trial before the court was made, either on the 8th or 11th of June. No exception to the proceedings was taken. The jury was as completely waived as possible, and nothing appears in the record but what such waiver was a voluntary one.

The main controversy in the case was over a large pier-glass,—one of three, the other two being small ones; the price of the glasses being agreed upon at $125 for the

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three. The glasses were accepted and delivered apparently all right. Subsequently defects were noticed in the large glass. These defects were in the silvering. The plaintiffs, upon being notified of the defects, took the glass away, with an agreement to replace it. The glass was shipped to New York to be resilvered.

There is a dispute between the parties as to the length of time before it was to be replaced. The mirrors were first put up in the store of the defendant July 4, 1887. Madame Roos claims that the mirror, when taken away, was to be replaced within two or three weeks. There was no agreement that it must be done in that time, but plaintiffs promised that it would be back in that time. She waited from about the middle of July until the 6th of September, importuning them at different times to hurry up with the glass, as she was in great need of it.

In the early part of September she notified plaintiffs that she was going to New York, and that, if the mirror was not put in before she went, she should buy one in New York. On the 6th of September, being in New York, she wrote to her manager to find out if plaintiffs had replaced the mirror, and told him to go to them, if it had not been put in, and tell them that she had bought one in New York, and they need not replace it. On that day she picked a mirror out in a New York store. Her manager told plaintiffs what she requested him to, and telegraphed her to that effect. He wrote to her to the same effect, and on receipt of the letter she bought the New York glass. Afterwards the plaintiffs tendered her the mirror they took away, resilvered, and apparently without defects. She refused to receive it.

The court found that the pier-glasses were ordered by the defendant of the plaintiffs, and the price agreed upon; that they were delivered, and accepted by her; that although a latent defect was afterwards discovered, which

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plaintiffs undertook to remedy, this did not relieve the defendant of her liability to pay for them. This finding is erroneous in law, and contains no determination of the disputed facts. The plaintiffs' testimony tended to show that no time was stated in which they were to return the mirror, but that the defendant was informed that, as soon as it could be done, the mirror would be resilvered by the manufacturers and put up again. She knew that it had to be sent away to the manufacturers, and consented it might be done. There were no defects except in the silvering, and these could not be seen or detected at the time the mirror was delivered.

If the defendant's testimony was accepted by the court as true, she was not bound to take the glass unless returned within the time promised. If the plaintiffs' evidence was taken as true, they were entitled to a reasonable time in which to return the mirror, resilvered. The court should have found which was the correct version of the transaction.

Under the law as found by the court, the defendant was not entitled to reject the mirror, because she accepted it in the first place, when the defects were not apparent. This is not the law. The defects were latent, but, when discovered, the defendant was not bound to keep the mirror. She had purchased it for a particular purpose, known to plaintiffs, and by sample. If she agreed to have it resilvered and returned, instead of rejecting it, she would be bound by such agreement as far as it went, but no further. As there was no finding of fact, we cannot determine the case here, but must treat it as a mistrial.

The judgment of the court below must be reversed, with costs, and a new trial granted.

SHERWOOD, C. J., CHAMPLIN and LONG, JJ., concurred. CAMPBELL, J., did not sit.

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THE PEOPLE v. JOSEPH EVANS.

Criminal law—Indorsing names of witnesses upon information—Continuance—Jury—Challenges for cause—Rape—Evidence—Character of respondent—Conduct of prosecutor—Charge to jury—Defective return of justice—Plea in abatement.

1. The court may properly permit the prosecuting attorney to indorse the name of the complaining witness, whose testimony was taken on the preliminary examination, upon the information after the jury is sworn, he having failed to make such indorsement through inadvertence; but if the respondent makes a reasonable claim that he is not prepared to meet the testimony expected to be given by said witness, he should be allowed a reasonable time to prepare his defense.
2. Where on the trial of a father for an alleged rape upon his daughter the name of the daughter is indorsed upon the information as a witness after the jury is sworn, the request of the respondent for a continuance over the term should be granted, he claiming to be unprepared to meet her testimony; and it is error to continue the case for a number of weeks, and allow the jury to separate and return and try the case, the respondent not consenting to such continuance, and objecting to said trial.
3. Where, after a jury is sworn, the case is continued for some weeks, and the jury allowed to separate, and on their re-assembling the respondent is permitted to challenge jurors for cause, a challenge to a juror who admits that he has heard some talk about the case upon both sides, which he could not narrate, having heard so many stories, but that he had heard people talking about the public sentiment about the case, in which conversations he took no part, and did not think he had been influenced thereby, should be allowed.
4. Where, in such a case, one of the jurors denied stating to a certain person, since the continuance of the case, that he believed that the respondent was guilty, the respondent should be allowed to call the person named to establish the fact, and if, after hearing his evidence, the court entertains any doubt on the subject, a challenge for cause should be sustained.
5. Where, on the trial of a father for an alleged rape upon his

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daughter, she is the sole witness for the prosecution, and is contradicted by the father, and does not deny having stated to third parties that the charge sworn to was untrue, they having testified to such statements by her; evidence of her having repeatedly made similar accusations against her brothers and other persons, and afterwards admitted their falsity, is admissible, as tending to show a morbid condition of mind or body, and as explaining the charge made against the father.

6. The failure of a respondent to offer affirmative evidence of his good character raises no legal inference that he is guilty of the offense charged, or that his character is bad, and it is the gravest error for the court to permit the prosecuting attorney to comment upon the absence of such testimony, which is not cured by an instruction to the jury not to consider such argument.

7. This Court has upon numerous occasions been called upon to express its opinion upon the conduct of prosecuting officers in the prosecution of criminal cases, and has often laid down the rule that it was their duty, as well as the duty of the court, to see that the accused had a fair and impartial trial. They are not the attorneys of the complaining party, but represent the people, who are as much interested to protect the innocent as in the conviction of the guilty.

8. It is error for the court, on the trial of a respondent for rape, where the whole theory of the defense is that the charge of the prosecutrix is fabricated, to instruct the jury upon the theory that the respondent claims a want of sufficient resistance on her part to constitute the offense, as shown by her failure to make an outcry or resistance at the time, or complaint afterwards, which evidence was drawn out upon her cross-examination.

9. Until the examining magistrate has determined that an offense, not cognizable by a justice of the peace, has been committed, and that there is probable cause to believe the respondent guilty thereof, and has so certified to the circuit court, the prosecuting attorney has no authority to file an information, and a return by order of the court, made after such filing, will not give the court jurisdiction to proceed on said information.

Error to Alcona. (Simpson, J.) Argued October 17, 1888. Decided November 1, 1888.

Respondent was convicted of rape. Conviction set aside

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and respondent discharged. The facts are stated in the opinion.

Frank Emerick, for respondent.

Moses Taggart, Attorney General, and *W. E. Depew,* Prosecuting Attorney, for the people.

[The points of counsel and authorities are fully covered by the opinion.—REPORTER.]

LONG, J. The respondent is charged with the crime of rape, committed upon his daughter, Rose Evans, on September 20, 1885, at Harrisville, Alcona county; and upon his trial in the circuit court for said county, April 5, 1888, was found guilty of the offense charged.

Upon his arraignment in the circuit court, under the information then filed, he interposed a plea in abatement, which was overruled by the court. The record shows the following facts as to what took place in court after such plea was overruled: February 14, 1888, the respondent being present, and trial ordered, thereupon came a jury, etc., who were duly impaneled, tried, and sworn, etc.; February 15, the jury heretofore impaneled in this cause came and sat together; and thereupon, on motion of the court, and by consent of counsel, cause adjourned until the next morning at 9 o'clock. February 16, the jury impaneled in this cause came and sat together, and upon motion of counsel for respondent, and upon consent of counsel for the people, the further proceedings were postponed until April 4, 1888, at 9 o'clock in the forenoon. April 4, the jury heretofore impaneled in this cause came and sat together, and heard the proofs and allegations of the parties in part. April 5, 1888, the jury found the respondent guilty.

It further appears that on the 14th of February, 1888,

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when the cause was called for trial and jury impaneled, the prosecuting attorney opened his case to the jury by making a statement of the people's case, and what he expected and intended to prove by the witnesses; at the conclusion of which statement he called as a witness for the people Rose Evans, the daughter of the respondent. Counsel for the respondent made objection to her being sworn, on the ground that her name was not indorsed on the information. The prosecuting attorney then stated to the court:

"It seems her name is not on the information, and I did not know it until now, but I knew the case could not proceed without her testimony."

The prosecuting attorney was permitted to indorse the name of the witness on the information, at the same time the court stating to the counsel for the respondent:

"If the defendant desires time to meet any surprise, if there is any, he can have it."

Counsel for respondent then asked the court that the cause be continued until the next term. This the court refused, but continued the case until April 4, 1888. It does not appear from this part of the record that respondent's counsel consented to have the case set for this time, though the order entered in the court journal shows that this adjournment or continuance was had on motion of respondent's counsel, and by consent of the prosecuting attorney. It is now contended by counsel for respondent that he urged upon the court that the jury be discharged, and the cause continued over the term, and we think the record bears out this statement. Time was asked by respondent's counsel, but it does not appear he had any voice in fixing the date to which it was continued, or that the jury then impaneled was to return at that time

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and hear the case. This was fixed by the court, and the court then stated to the jury:

"This case will be adjourned until the 4th day of April, and you will abstain from conversing with any one, or listening to any one conversing about the case."

It also appears that, at the adjournment had the night before, the court had also cautioned the jury, in which the court said:

"If any one attempts to converse with the jury, you will report to me about it. If any person comes around, and proposes to converse with them, or seeks a conversation with them about it, you will report the name of that person to me."

On the 4th of April, after the jury had returned into court, the counsel for respondent called the attention of the court to the journal entry of February 16, and asked that it be corrected, as the adjournment was not on his motion. The court refused to make the correction, and ordered that the entry be left to stand as made.

Section 9549, How. Stat., provides that the prosecuting attorney shall indorse on the information the names of the witnesses known to him at the time of filing the same,—

"And at such time before the trial of any case as the court may, by rule or otherwise, prescribe, he shall also indorse thereon the names of such other witnesses as shall then be known to him."

In the present case it appears that the name of the witness was known to the prosecuting attorney at the time of filing the information, but that her name was not indorsed, through inadvertence. Some discretion is left with the court, under this statute, in reference to the indorsement of names of witnesses on the information; and we think, under the circumstances here stated, the court very properly allowed the prosecuting attorney to make the indorsement. The witness had been produced

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on the examination before the justice, and there gave testimony. She was the most important witness for the people in the case, and that fact must have been well known to respondent's counsel. In permitting the indorsement of this name on the information, however, the court was bound to take care of the rights of the respondent; and, if reasonable claim was made that he was not prepared to meet the testimony expected to be given by the witness whose name was so indorsed, the court should have given reasonable time to the respondent to prepare his defense, and we think the case should have been continued over the term, as requested by respondent's counsel. The court granted a continuance, but, without the consent of the counsel for respondent, put the trial down for April 4, and directed the same jury to return at that time, and hear the cause.

What might have been anticipated and expected from the excited state of feelings in that community, naturally growing out of the crime charged, seems to have followed. A father was charged with rape upon his own daughter, a girl then only about 14 years of age. It is a charge which in any community would stir up and arouse, not only comment, but a feeling of hostility to a person charged with so heinous a crime. Good men and good women would naturally feel that no punishment could be meted out, to such an unnatural father, adequate to the crime; and though the man may have been ever so well known in the community, and have borne ever so good a character for honesty and virtue, yet a charge made by his own daughter would tend strongly to impress people in any community with the truth of the charge. People would talk about it, and necessarily these things would come to the ears of the jury, separated and returning to their homes, and there remaining from February 16 to April 4,—a period of over six weeks.

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Perhaps there is no crime known to the law that would arouse more feeling and comment in a community than the one here charged.

After the jury had returned to their seats in the jury-box, on April 4, 1888, counsel for respondent again asked the court that the cause be continued over the term, and the cause then tried before a jury to be impaneled. This the court refused. Counsel for respondent then asked that he have leave to challenge certain of the jurors. Judge Kelley, who then appeared in the case as counsel for the people, stated:

"I think that, owing to the unusual length of time since the adjournment in this case, the respondent should have the right to challenge any juror for cause."

The prosecuting attorney then said:

"The jury has been sworn, but we will waive that.

"*By the Court.* You can challenge for cause any juror."

Counsel for respondent was then permitted to examine Mr. McClatchey, one of the jurors; and from such examination it appears that he had heard some talk about the case on both sides; that he could not tell just what talk was had, he had heard so many stories; that he had heard people talking about the public sentiment about the case,—about the feeling in the community; that the people were talking about the state of public sentiment in the community, but that he took no part in these conversations, and did not think he had been influenced by them. Respondent's counsel then challenged the juror for cause. The court refused the challenge, and overruled the motion to discharge the juror from the panel.

Mr. Miller, one of the jurors, was then examined by the counsel for respondent, and asked:

"*Q.* Do you know George H. Lee, of Alcona township?

"*A.* Yes, sir.

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"*Q.* Did you not state in George H. Lee's presence, since the last adjournment of this case, that you believed that Evans was guilty?

"*A.* No, sir."

Counsel for respondent then offered to show by Mr. Lee, who was present in court, that Mr. Miller, the juror, stated in his presence, since the adjournment of the case, that he believed Evans guilty.

"*By the Court.* I shall not permit it."

These rulings of the court were all excepted to by respondent's counsel, and error assigned thereon.

We think the court erred in not permitting the case to be continued over the term, when requested by counsel, and continuing it for six weeks, and recalling the same jury for its trial, under the circumstances. Having recalled the jury, and permitted respondent's counsel to challenge for cause, it was error not to excuse the juror McClatchey. The respondent had a right of trial by an impartial jury, and during the progress of the trial he had a right to have all matters that could in any way tend to influence or bias their judgment excluded from them. The juror himself confessed that people had been talking in his presence about the facts of the case, the state of public sentiment upon the case, and the feelings of the community in regard to it. It is evident that the sentiment of the community was against the respondent, and, human nature being no different in jurors than in others, it must be presumed that with this feeling in the community, constantly talked of and in presence of this juror, he may have, however unconsciously, imbibed some of this sentiment, which may have influenced and biased his judgment. It is no answer that the juror thought he had not been influenced. If on the trial of the cause evidence of public sentiment had been allowed to go to

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the jury, nothing could save the verdict. *Churchill v. Circuit Judge*, 56 Mich. 540 (23 N. W. Rep. 211).

Counsel for respondent should have been allowed to call witnesses to establish the fact that the juror Miller had expressed the belief that the respondent was guilty of the offense with which he stood charged, or at least the court should have heard the evidence offered, and, if any doubt was entertained by the court after hearing the evidence, the court should have allowed the challenge for cause. The law intends that jurors shall go into the jury-box entirely unbiased, impartial, and indifferent. Therefore every exertion is made to exclude all who have formed a fixed opinion in respect to the matter in issue. For the purpose of discovering those so disqualified, a rigid and searching inquiry is allowed previous to the acceptance of the juror. This is usually done by the examination of the juror himself, under oath, on his *voir dire*, as the phrase is; but, in addition to this, witnesses can be called to testify to any fact tending to show the incompetency of the juror. Proff. Jury, § 166; 1 Bish. Crim. Proc. (3d ed.), § 934; 3 Whart. Crim. Law (7th ed.), § 3131; *People v. Mather*, 4 Wend. 233.

The original jurors sworn in the case on February 14 were retained as jurors in the cause, and the trial proceeded. The prosecuting attorney was permitted by the court, under objections of respondent's counsel, to again make an opening of his case to the jury.

Witnesses were then called and examined, from which it appears that the respondent, in September, 1885, was living in Harrisville with his family, consisting of himself; his wife, Esther Evans, the step-mother of Rose, to whom he had been married since November 1, 1881; his two boys, George and Charles, who were at the time aged 17 and 11 years, respectively; Rose, his daughter, then 14

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years of age; a young child by his wife, Esther; and Esther Evans' mother, a Mrs. Huston.

Some time about the middle of September, 1885, Mr. Evans and his wife had some trouble about their family affairs, and Mrs. Evans and her mother, Mrs. Huston, left Harrisville, and went to Alpena to a sister of Mrs. Evans. Mrs. Evans remained away about four weeks, when she returned. Mrs. Huston remained away until February, 1886, when she also returned to live in the family again. It is claimed that during the time Mrs. Evans was away the crime was committed.

Rose testified substantially that during the time Mrs. Evans was away she slept upstairs in a back-room; that there were two rooms upstairs, a front and a back room,—two beds in the back-room, and one in the front room; that the boys slept down-stairs; that during the time Mrs. Evans was away she was alone upstairs some of the time, and some of the time Mrs. Bond and Gustie Moore stayed there; that one evening when she went to bed upstairs her father was not at home; that Charlie was down-stairs; that her father came upstairs, and when he came to her bed she awakened; that he got into bed, and there had intercourse with her; that she said, "Don't, father," and he told her to keep still; and that she made no further outcry; that she made no disturbance, because she was afraid.

Witness further testified that she first told Mrs. Huston of what her father had done; that this was the first night after Mrs. Huston returned to live with them. On cross-examination, this witness was asked:

"*Q.* You don't claim that he fully accomplished his purpose, do you?

"*A.* I know he tried pretty hard.

"*Question by Counsel.* You don't claim he penetrated you?"

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No answer was made by the witness, when the court asked:

"You know what penetration means?
"*A.* I am not altogether a fool.
"*By the Court.* Then answer the question.
"*A.* Yes; he did."

Witness further testified that he left no marks upon her person, nor did he tear her clothing in any way. Witness was then asked by counsel for respondent:

"Rose, haven't you made other charges of this same nature against other men that were perfectly innocent?"

This was objected to by the prosecution as immaterial. The court permitted the question and answer, but remarked to counsel:

'You may ask the question, but you will have to accept her statement."

The question being then repeated, the witness answered: "No; I didn't."

Witness further testified that this was the only circumstance of the kind between her father and herself; that her father had whipped her sometimes severely. The people rested their case upon the testimony of Rose Evans.

The defendant was produced as a witness in his own behalf, and testified that the story told by Rose was entirely and wholly untrue; that the first he ever heard of the accusation was in March, 1886; that the only time he ever punished Rose severely was when she disobeyed him, and went to the barn with other boys besides her brothers.

Mrs. Esther Evans was sworn as a witness in behalf of respondent, and from her testimony it appears that her mother had made trouble in the family, and sometime in March was about to go away; that Rose came in one

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evening, when her mother told her the story told by Rose. Mrs. Evans then said:

"'Rose, you ought to be ashamed of yourself to tell such stories as that. You have told the same of your little brothers, and you have told fearful stories about me, and now you have commenced to tell stories about your father.' Rose got up, and I said: 'Rose, do you mean to say that story is true?' And she says: 'No, ma; it is not true; but I had to tell her something to shut her mouth.' Then mother got up, and she says: 'Do you deny that?' And Rose says: 'Yes, I do; you are always picking stories out of me.' Rose before this had said her brother George had tried to corner her up, down stairs, and insult her, and afterwards said it was not true."

This statement is corroborated by Charles Evans, then a boy 14 years old. He says:

"My grandmother, mother, and Rose were there; and while they were talking Rose got up, and slapped her chair against the wall, and said it was just a lie she told to please her grandmother."

These statements were not contradicted by Rose.

It was clearly shown on the trial, and not disputed, that Mrs. Evans and her mother went away on Friday night. On the following Monday morning Mrs. Bond came there to sew for the family, and remained there all the time, with the exception of two Saturday nights, until Mr. Evans left to bring his wife back. While she was there she always slept in the same room with Rose. Rose testified that this affair took place before Mrs. Bond came. Gustie Moore stayed there several nights, and slept in the same room with Rose. The two Evans boys testified that on every night while Mrs. Evans was gone, and Mrs. Bond or Gustie Moore was not there to sleep with Rose, the brother Charlie slept in the other bed, in the same room with her. This is not denied by Rose.

Upon Mr. Evans' return to the house, on the night Mrs. Huston told this story to Mrs. Evans, he noticed

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something unusual in the appearance of his family, and asked what the trouble was, and was told by Mrs. Huston. In his anger, he drove both Mrs. Huston and Rose away from his house. Outside parties took the matter up, and a prosecution for incest was first instituted, which was finally dropped in the circuit court, and the prosecution for rape begun.

Mrs. Elizabeth Carle was called as a witness for the defense on the trial. She lived next door to Mr. Evans, and during the time Mrs. Evans was gone she was in the house almost every day. Witness was asked by counsel for respondent:

"Did you ever have any conversation with Rose about a charge she made at one time against George Evans having made a similar assault upon her?

"Yes, sir; she said—"

The further answer was objected to by the prosecution, and objection sustained by the court. Counsel for respondent then offered to show by the witness that Rose did make similar accusations against her brothers George and Charlie, and other people, in a great multitude of cases, and then admitted that they were not true; that she had a sort of mania for telling that men made assaults upon her of a like character. Counsel for respondent then offered to show by the witness that the girl Rose, in the spring of 1885, made a charge against a prominent citizen of that village, of having taken her into a compromising position with himself, and having exhibited his person to her, and compelled her to handle his private parts; that she afterwards admitted its falsity.

"*By the Court.* You have asked her this question, and she said, 'No,' and you now bring in another witness to show she lied, and the question is whether it is not distinctly collateral matter. I am inclined to take the position I did yesterday, when I permitted you to ask the question, and it will have to rest there."

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Exception was taken to this ruling, and error assigned thereon. We think this evidence should have been admitted. The people rested their case upon the testimony of Rose Evans alone. No other witness was sworn by the people. She is flatly contradicted by the respondent, her father, and she does not dispute the testimony of her mother and her brother Charles in their statement that, though she told her grandmother the story, it was not true. The testimony of Mrs. Bond and Gustie Moore, taken in connection with that of her two brothers, as to the room being occupied by some person with her every night during her mother's absence, tends strongly to contradict her story. It is difficult to understand or comprehend how a girl who apparently has all her faculties can make such a charge against her father if it is false, unless, as claimed by counsel for respondent, there be some mental or moral peculiarity about the girl herself. The jury were asked to take her story, and in reliance thereon find the respondent guilty. It became a question of fact for their consideration; and they ought to have been made acquainted, under the circumstances stated and proven, with the mental and moral qualities of the girl. If she was accustomed, and had on numerous occasions, as claimed by counsel for respondent, made statements charging, not only her brothers, but numerous other men of that community, with other similar offenses, and then admitted the falsity of such charges, it would have a tendency to show a morbid condition of mind or body, and go a long way in explaining this charge, which, under the circumstances, and the surroundings shown to exist, seems almost unaccountable. It is claimed that the testimony offered would tend to show that she was the subject of hallucinations upon this subject, and is in its nature independent evidence, and in no sense collateral.

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We think this view is sustained in the case of *Derwin v. Parsons*, 52 Mich. 426 (18 N. W. Rep. 200). Mr. Justice COOLEY, in his opinion in that case, says:

"The case was one which justified a good degree of liberality in the admission of evidence. The parties were directly opposed in their testimony, and the jury would be likely to accept the statement of the one who was best supported by the circumstances. * * * To questions whether the plaintiff had not made charges similar in nature against two other persons, objection was made, but we have no doubt it was proper to allow them, and also to prove the facts, if she denied having made the charges."

Complaint is also made of the argument of Judge Kelley to the jury in the close of the case. Judge Kelley said:

"Joseph Evans had the right in this case that the law of this Commonwealth gives to him, and says to us: 'You cannot deprive him of it, when he avails himself of it.' It says to him: 'You may bring into this court, before this jury, one or two or three or a score of the best people of this county, to testify to your good character as a citizen, and good moral character as a man, and conduct and deportment.' Joseph Evans, if you had done this in this case, by ten good people, I think that the jury might have acquitted you of that charge. It is the great and potent evidence in a case of this kind, where the evidence is of one against the other; and I say to you, gentlemen of the jury, the want of it is a circumstance that you cannot overlook as honest men and good citizens and jurors. That door was closed to us. We could not put a living soul upon the stand to prove the contrary to his good character until he put his witnesses on. It would have been of the utmost importance in this case, when his statement is pitted against this poor girl, and stands there face to face with her statement, that ten good respectable men, or six, or any number, of good citizens, should come in and say: 'I have known him for ten or fifteen or twenty years as a man of good character;' and we have the right to say to you, what do you think of that when this door is opened, and he does not avail himself of it?"

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Much other language of like character was indulged in by the counsel for the prosecution in his closing remarks to the jury. These remarks were permitted by the court, under objection of counsel for respondent. This certainly was error of the gravest character. No presumption of guilt arises from the fact that a person, when on trial for a crime, fails to call witnesses in support of his good character. This is a privilege which the accused may avail himself of if he chooses. If a person on trial for an alleged offense offers no evidence of his good character, no legal inference can arise from such omission that he is guilty of the offense charged, or that his character is bad. Whart. Crim. Ev. (8th ed.) § 62. The court should not have permitted such an argument to the jury. The jury, while deliberating on their verdict, have no right to take into consideration the fact that respondent failed to call witnesses in support of his good character, and weigh it against him as testimony in any manner to establish guilt. 1 Bish. Crim. Proc. (3d ed.) § 1119.

The error was not cured by the court afterwards instructing the jury that they should not consider such argument. Counsel for respondent calls our attention to a recent case in Illinois fully sustaining this doctrine. The statute of Illinois provides that—

"A defendant in any criminal case or proceeding shall only, at his own request, be deemed a competent witness; and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect."

In *Quinn v. People*, 123 Ill. 333 (15 N. E. Rep. 46), counsel had assumed to comment on defendant's failure to testify in his own behalf; and the supreme court of Illinois, considering that case, say:

"How much did it avail for the court to tell the jury that the remarks of counsel were improper? His words had found a lodgment in the minds of the jury, spent

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their force, and subserved the purpose for which they were uttered, and it were idle to talk about removing their effect upon the jury by a mere declaration from the court that they were improper. As well might one attempt to brush off with the hand a stain of ink from a piece of white linen. One, in the very nature of things, is just as impossible as the other."

It cannot matter whether these safeguards are thrown around the accused by statute or by the common law, to the end that he have a fair and impartial trial. It was gross error for the prosecution to indulge in such remarks, and the error was not cured by the charge of the court. It is undoubtedly true that these words were more potent, and more effective and lasting, falling from the lips of one who was at the very time of their utterance occupying the honorable and high position of a circuit judge in an adjoining circuit.

This Court has upon numerous occasions been called upon to express its opinion upon the conduct of prosecuting officers in the prosecution of criminal cases, and has as often laid down the rule that it was their duty, as well as the duty of the court, to see that the accused had a fair and impartial trial. They are not the attorneys of the complaining party, but represent the people, who are as much interested to protect the innocent as in the conviction of the guilty.

We are not called upon in this case to express any opinion as to the right of a circuit judge of an adjoining circuit to lend his aid in the prosecution of a criminal case,—to lay off, for the time, his judicial ermine, and take part as counsel; but it seems to us that as well might the judge of the circuit call an adjoining circuit judge to preside, and he take part as a prosecuting officer, and from the bar give his opinion of the guilt or innocence of the accused. An opinion so given would in

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most cases be as potent in its influence upon the jury as though given from the bench.

Section 7247, How. Stat., provides:

"No judge can practice or act as a counsellor, solicitor, or attorney in the court of which he is a judge, except in those suits in which he shall be a party, or in the subject-matter of which he shall be interested."

Under this statute, it was held by this Court in *Bashford v. People*, 24 Mich. 244, that, though the circuit judge had resigned, his resignation to take effect five days thereafter, and had called another judge to preside, he was disqualified to appear as counsel in the case; Mr. Justice COOLEY remarking in that case:

"We have no doubt that whatever connected with a trial is forbidden on grounds of public policy the party concerned may except to; and that he has the same right to insist upon his exception when it has reference to the breach of a rule prescribed for the direction of the highest officer of justice as of one for the lowest. The correctness of motive, the high standing and upright character of the officer concerned, cannot be considered on such an exception, and consequently cannot be an answer to it."

In *People v. Cline*, 44 Mich. 290 (6 N. W. Rep. 671), it was held that the prosecuting attorney was disqualified from prosecuting a criminal proceeding where the complaining witness was his brother, and the firm to which he belonged was to be affected by the transaction.

It is contended, further, by counsel for the respondent, that the charge of the court was utterly unfair to defendant, and misleading to the jury, in entirely failing to call their attention to the evidence showing that no assault whatever had been committed upon the girl; that the court should have called the attention of the jury to the evidence of the defendant that he had not assaulted her at all; the evidence of the two Evans boys that upon

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every night while Mrs. Evans was gone, and Mrs. Bond was not there, Charles slept in the bed in the same room with her, because Rose was afraid to go upstairs alone, which Rose did not deny; that, when her charge against her father was first made known by Mrs. Huston to Mrs. Evans, she denied the truth of the story, as sworn to by Mrs. Evans and Charles, and that this she did not deny.

Instead of the court calling the attention of the jury to these facts, the charge went upon the theory that the defendant claimed the girl had not resisted to the extent necessary to make connection, under the circumstances, rape; and that this was evidenced by the girl's failure to make an outcry or resistance at the time, or complaint afterwards. The record shows that evidence of this character was drawn out of the girl upon her cross-examination; but the whole theory of the defense was that the story of the girl was fabricated, as such stories had been fabricated by her in reference to other parties, and upon this theory the case should have been submitted to the jury by the court. Putting the defense to the jury in this case, that the father made claim that his daughter should have resisted to the utmost of her strength in order to make the offense rape, when the whole theory of the defense was that the girl had fabricated the story, was not only misleading to the jury, but such theory would of necessity prejudice the mind of any fair-minded man upon the jury.

A more serious question, however, remains to be discussed. As we have stated, upon the arraignment of the respondent upon the information then filed, his counsel interposed a plea in abatement; stating as the grounds of such plea that the justice before whom the examination was held had not stated in his return that any offense not triable by a justice of the peace had been committed,

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nor had said justice in said return stated that there was probable cause to believe the respondent guilty of the crime charged, or of any offense or crime, but that, on the contrary, said justice expressly declared that he did not believe that said offense had been committed, or that respondent was guilty thereof, and that he only required respondent to recognize to appear for trial in the circuit in deference to and by reason of the intense public feeling upon the subject against respondent. This plea was verified on December 7, 1886. On the same day the justice, by order of the circuit court, made a further and amended return to the examination had before him, in which he states that upon such examination—

"It appeared to me that an offense not cognizable by a justice of the peace had been committed, and that there is probable cause to believe the prisoner guilty thereof."

Upon the filing of this amended return the court overruled the plea in abatement, and the cause proceeded to trial upon the information, which was filed before such further return was made by the justice. The certificate and return first made by the justice is not set out in the record, but it is sufficiently shown by the plea filed, and the further return made, that the first return to the examination, and the one upon which the information was filed, did not contain any finding that it was made to appear on the examination that a crime had been committed, and that there was probable cause to believe respondent guilty. These were necessary prerequisites to the filing of the information, The examination of persons charged with offenses not cognizable by a justice of the peace was designed to take the place of a presentment by the grand jury; and it is only where it shall appear from such examination that an offense not cognizable by a justice of the peace has been committed,

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and that there is probable cause to believe the prisoner guilty thereof, that he can be held for trial. How. Stat. §§ 9470, 9471.

The statute requires the justice, after "an examination of the whole matter," to come to an opinion as to whether or not an offense has been committed; and, if of opinion that there has been, then as to whether there is probable cause to believe the accused guilty thereof, and thereupon to discharge or hold him to answer according to the conclusion reached; and it is only when the conclusion reached by the justice, after an examination of the whole matter, is that an offense has been committed, and that there is probable cause to believe the accused guilty thereof, and so certified to the circuit court, that an information may be filed. This conclusion or opinion of the justice is a judicial determination, and the basis of the right to proceed in the circuit court by filing information. *Annis v. People*, 13 Mich. 511; *Turner v. People*, 33 Id. 363; *Yaner v. People*, 34 Id. 286.

In the present case, it appears that at the time the information was filed in the circuit court, upon which the respondent was put upon his trial, no determination had been made by the justice, either that any offense had been committed, or that there was probable cause to believe the respondent guilty, and the prosecuting attorney had no authority to proceed in the circuit court by filing such information. The fact that the court compelled further return does not aid the right to proceed. The information was filed upon the return of the justice, as it then appeared. We are not called upon to determine whether a new information might have been filed after the justice's further return was filed in the circuit court. The court refused to quash the information then filed, and the case proceeded to trial thereunder. The circuit court having no jurisdiction at the time of filing the

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information, it follows that a conviction thereunder cannot be sustained.

For the errors pointed out the conviction must be set aside, and respondent discharged.

The other Justices concurred.

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76	434
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77	560
72	388
79	253
72	388
108	104
72	388
f110	684
72	388
150	473

JOHN H. TEMMINK v. THE METROPOLITAN LIFE INSURANCE COMPANY.

Life insurance—Application—Agent filling in answers of applicant—Fraud.

This is a case involving alleged false answers by an applicant for life insurance to questions regarding past sickness and medical attendance, and it is held that the facts as to what was asked and answered rest in the conflicting proofs, and that the jury must have found that the agent put down answers that the applicant never made, and that she did not know that she was signing any such statements, and the case is held not to differ in principle from *Brown v. Ins. Co.*, 65 Mich. 306, or from other cases involving similar questions, and the judgment against the defendant is affirmed.

Error to Wayne. (Brevoort, J.) Argued October 23, 1888. Decided November 1, 1888.

Assumpsit on life insurance policy. Defendant brings error. Affirmed. The facts are stated in the opinion

Edmund Haug (*C. A. Kent*, of counsel), for appellant.

Conley, Maybury & Lucking, for plaintiff.

CAMPBELL, J. Plaintiff, who was made payee of a life insurance policy issued to his wife, sued defendant and recovered below the amount insured. The defense set up

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was that the policy was issued on false representation and concealment of the state of health of the insured, Mrs. Jennie Temmink. The specific assertions pleaded were—

1. That she had never been sick.
2. That she had never been attended by any physician.
3. That she never had any disease of the lungs.

The policy was obtained November 23, 1885. She died February 23, 1887. The cause of death was sworn to have been consumption, which probably existed when the policy was applied for, and she had some time before that been treated by one or more physicians, who supposed her to be consumptive, although not under care in November, 1885.

Evidence was given of an application on a printed form, which has such blanks as were filed written in by W. P. Fraser, the agent. The applicant's signature is near the beginning of the blank, and at the end of what purports to be a declaration and warranty that all the answers are true. On the back of the blank for the applicant's signature is a printed certificate, signed in the agent's handwriting, that he had made a personal examination, and that the applicant was sound and insurable. The answers filled in and claimed to have been false are these:

"Condition of health? Good. When last sick? Never. Of what disease? None. Name of physician who last attended life proposed, and when? None. Is said life now in sound health? Yes."

There is a long list in small type, like the rest of the blank, comprising in one group 27 forms of malady, and applicant was asked to declare whether she had ever had any of them. In the copy furnished us no answer is put down to this question, although defendant's counsel assumed it was answered negatively, and the original may possibly show it. There were negative answers given to

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questions touching tobacco, opium, and alcoholic stimulants.

Upon the trial the agent testified that he put most of these questions, and took down the answers, but he does not remember that he asked her about the particular diseases. When asked if she told him she had never been sick, he said she did so indirectly, and explained this by saying she said she had been sick of coughs, colds, and the like of that, but he says she said she had not had a doctor. He admits he did not ask her any questions concerning stimulants.

On the contrary, the mother of deceased, Mrs. Grootvelt, testified positively to being present, and knowing all that passed between the agent and her daughter. She says the agent, with whom she herself was insured, was somewhat pertinacious in trying to get her daughter to take an insurance, and that he did not question her at all upon the matters referred to. Neither the agent nor the mother testifies that Mrs. Temmink had any instructions as to the purport or importance of the application, or that she read it or was requested to read it, or knew what was put in it. The inference even from the agent's testimony is pretty strong that she had no reason to understand that the application had any important office to fulfill.

The charge of the court referred to the conflicting testimony without attempting to recite it, the trial having been short, and the facts fresh in the minds of the jury. The judge charged the jury upon the effect of the agent's testimony as follows:

"If, on the other hand, you believe that at the time Mr. Fraser, the agent of the company, called at the house, while he was there talking with Mrs. Temmink, the daughter of Mrs. Grootvelt, the wife of the plaintiff here, that he took down all these answers to the questions given by her, and that it was signed by her,—that

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these answers, as they appear before you, were signed by her,—then, gentlemen, your verdict should be for the defendant."

He had already charged that if the agent put down answers untruly, and if they believed Mrs. Grootvelt's testimony, plaintiff should recover.

There is nothing in the testimony to indicate that Mrs. Temmink knew what answers the agent wrote in the blanks, or what the blanks contained. The paper was not read to her or by her before it was signed, so far as appears. The agent, when he had written what he did write, asked or told her to sign. All the facts as to what he asked and what she answered, rest in the conflicting proofs.

It is not claimed that, if Mrs. Temmink deliberately and understandingly made the representations she is charged to have made, there could be any recovery. But defendant claims that if consumptive her life was not insurable at all, and needed no assertions or questions, and also that, as the answers were written in before Mrs. Temmink signed the application, she and her estate would be bound.

It appears from the policy itself that consumption is not reckoned as rendering persons uninsurable. It is expressly provided that, if the insured die of consumption within three months, no benefits should be due, and if within a year, only half payment should be made. It also appears that on small policies no medical examination is required, and the agent or company's physician satisfies himself, and his certificate is accepted by the company. Such a certificate was given here. It also appears that for an insurance of $188 the insured, who was 25 years old, made weekly payments of 10 cents, which is a very high premium on sound lives.

We do not think this case differs in principle from the

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case of *Brown v. Ins. Co.*, 65 Mich. 306 (32 N. W. Rep. 610), or from other cases involving similar questions. The jury must have found that the agent put down answers that Mrs. Temmink never made, and that Mrs. Temmink did not know that she was signing any such statements. There was nothing to show that she knew what the agent put down, or was told it was important she should know. No instructions were asked by defendant beyond a general request that the jury should find for defendant. If Mrs. Grootvelt told the truth, the agent committed a gross fraud on Mrs. Temmink, and there was nothing to authorize us to hold, if there was anything which would have justified the jury in holding, that she was in any way negligent in signing. The claim that the answers were actually put down in the shape they are now in, before signature, can hardly be said to be sustained, except by the agent's testimony, and this the jury did not believe on the main issue, and may not have believed on anything. It is quite plain that the jury could not have been required to believe that Mrs. Temmink had even so much information as is given by the reading of a written instrument in her hearing by another person. If the document was not truly interpreted to her, or if, as the jury must have found, it was falsely represented, at least by implication, it would be going too far to hold her estopped by what she was in no fault for relying on. By the testimony of all parties the agent assumed the whole preparation of the paper, and she had a right to suppose he did it honestly. It is not her fault if he did not act honestly. We discover no point that is practically open in this State. We think the case does not warrant us in departing from what has been settled here. The judgment must be affirmed.

The other Justices concurred.

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MARTIN L. SWEET AND DANIEL M. RUTHERFORD v. RUSSELL H. WOODIN AND GEORGE W. POWERS.

Bills and notes—Notice to indorser—Diligence—Joint maker—Liability of parties to commercial paper.

1. The rule requiring an indorser to be promptly notified of the dishonor of a note is one not of form, but of substance. It is a legal condition of the contract that he shall be notified or discharged, unless where reasonable diligence fails to find him, and this rule requires that the person giving the notice shall use such means as are reasonably calculated to find out the indorser's residence.
2. There is no legal presumption that the receiving teller at a bank knows anything about the parties on discounted paper, although he may do so.
3. It is the plain and obvious duty of a notary to apply to the officers of his own bank for information as to the residence of an indorser, and if they cannot give it to inquire where it is payable, as well as, in default of both, to seek further, which search, while not required to be unreasonably long where he has no clue, should be real, and not formal.
4. A second indorser, by putting his name above that of the payee, who has indorsed the note for the accommodation of the maker, chooses to make himself a joint maker, and disqualifies himself from recourse to the first indorser as liable to him in the order of time.[1]
5. It was held in *Greusel v. Hubbard*, 51 Mich. 95, that parties must sue and be sued on negotiable paper in the order in which they have seen fit to sign it.
6. A declaration in a suit under the statute against the indorser as well as the maker, must set forth a paper title accordingly.
7. Whether a firm can buy paper on which one of its members is a joint maker, and sue the other maker and an indorser under the statute in a suit at law, not decided.

Error to Kent. (Montgomery, J.) Argued October 26, 1888. Decided November 1, 1888.

[1] See *Brewer v. Boynton*, 71 Mich. 254 (head-note 2).

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Assumpsit. Plaintiffs bring error. Affirmed. The facts are stated in the opinion.

Ward & Ward, for appellants, contended:

1. The diligence shown in this case was as great as is required by the weight of authority; citing *Harris v. Robinson*, 4 How. 336; *Lambert v. Ghiselin*, 9 Id. 552; *Wood v. Corl*, 4 Metc. 208; *Chapman v. Lipscombe*, 1 Johns. 294.

2. Diligence having been shown, the fact that the notice was sent to the wrong address will not discharge the indorser; citing 2 Am. & Eng. Ency. Law, 417 (note 3); *Carroll v. Upton*, 3 N. Y. 272; *Garver v. Downie*, 33 Cal. 176.

3. Where all that can be learned is that the indorser lives in a given county, notice sent to the county seat of that county is good; citing *Bank v. Slason*, 13 Vt. 334; *Bank v. Russell*, 4 Gray, 167; *Rand v. Reynolds*, 2 Gratt. 171; and where, after due diligence, the residence of the indorser cannot be ascertained, no notice is necessary; citing 1 Pars. Notes and Bills, 498 (note c); and it would seem proper in such a case to mail notice to the place of the date of the note; citing Am. & Eng. Ency. Law, 416 (note 6); *Sasscer v. Whitley*, 10 Md. 98; *Godley v. Goodloe*, 6 Smedes & M. 255; and subsequent correct information does not affect the question; citing *Bank v. Philbrick*, 40 N. H. 506.

R. A. Maynard (*Birney Hoyt,* of counsel), for defendant Powers, contended:

1. How. Stat. § 1586, authorizes service of notice by mail—

   a—When the indorser resides or has a place of business in the same city, village, or township at which the notes are payable, and

   b—When upon information obtained by diligent inquiry he shall be reported so to reside or have a place of business.

There is no proof bringing this case within either of these provisions.

2. There is no presumption that either the maker or indorser of a note resides at the place where it is dated and made payable; citing *Riggs v. Hatch*, 16 Fed. Rep. 838; *Lowery v. Scott*, 24 Wend. 358; *Fisher v. Evans*, 5 Binn. 541; *Carroll v. Upton*, 3 N. Y. 272; *Spencer v. Bank*, 3 Hill, 520; *Bank v. Peirce*, 3 Ala. 321; *Tyson v. Oliver*, 43 Id. 465; *Hill v. Varrell*, 3 Greenl. 233; *Lawrence v. Miller*, 16 N. Y. 235.

3. To constitute due diligence the inquiry must be pursued until all sources of information are exhausted, unless a satisfactory answer is sooner received; citing *Hart v. McLellan*, 80 Me. 95

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(18 Alt. Rep. 272); *Riggs v. Hatch*, 16 Fed. Rep. 838; *Peirce v. Pender*, 5 Metc. 352; *Lawrence v. Miller*, 16 N. Y. 235; *Bank v. Dermott*, 18 Johns. 432; *Spencer v. Bank*, 3 Hill, 520; *Barnwell v. Mitchell*, 3 Conn. 101; *Witridge v. Rider*, 22 Md. 548; *Gilchrist v. Donnell*, 53 Mo. 591.

CAMPBELL, J. Plaintiffs, who were partners under the name of M. L. Sweet & Co., sued defendants on a promissory note, which ran as follows:

"$600. GRAND RAPIDS, MICH., Dec. 31, 1885.
"Thirty days after date I promise to pay to the order of George Powers six hundred dollars, at the Fourth National Bank, value received; interest at ten per cent. after maturity R. H. WOODIN."

Indorsed as follows:

"Pay Old National Bank, Grand Rapids, Mich., or order. M. L. SWEET.
"G. W. POWERS."

The maker, Mr. Woodin, made no defense. Mr. Powers defended on the ground that he received no notice of dishonor. This plea was sworn to, and no notice was sworn to have been sent to him at Sparta, where he lived, and there was no personal service. The notary who protested it did send a notice by mail directed to Powers at Grand Rapids. The protest, which contains an entry of notice, does not state any inability to find defendant's residence, but states it to have been at Grand Rapids as the reputed residence.

The question below was whether the notary had shown such due diligence as would hold the indorser, who did not actually receive the notice. The court below held that no such diligence was shown.

The rule requiring an indorser to be promptly notified of the dishonor of a note is one not of form, but of substance. It is a legal condition of the contract that he shall be notified or discharged, unless where reasonable diligence fails to find him. This rule requires that the

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notary or other person giving the notice shall use such means as are reasonably calculated to find out the indorser's residence. To some extent this rule is not a fixed and rigid one. But it requires active diligence in hunting up the matter.

In the present case the notary, on the maturity of the note, received it from the teller of the Old National Bank, and presented it at the Fourth National Bank, where payment was refused. The only personal inquiry he made concerning the residence of defendant was of the receiving teller of the Old National Bank, who gave it to him to protest. That gentleman did not know the address. The witness said, in a general way, that no one in the bank knew it; but it does not appear that he asked any one else, and it does not appear that the cashier or members of the discount board were ignorant of it. It appears affirmatively that the cashier of the Fourth National Bank knew all about it, and from defendant's long service as deputy-sheriff it is probable many others did.

There is no legal presumption that a receiving teller knows anything about the parties on discounted papers, although he may do so. The cashier, or board of discount, usually know on whose credit a note is discounted, and the address of the parties through whom they claim. Where their usage requires two names besides that of the principal debtor, it would be rather loose banking not to know something about it. Furthermore, where a note is payable at a particular bank, that establishment is quite likely to have such information. It is quite common where notes are payable at bank to leave them there for presentment, and for protest if needed.

It was a plain and obvious duty of the notary to apply to the officers of his own bank for information, and if they could not give it to inquire where it was payable,

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as well as, in default of both, to seek further. His search, while not required to be unreasonably long where he has no clue, should be real, and not formal. In the present case there was no search at all, and no reason for failing to make one.

There is another difficulty in the case, which ought to be noticed. It seems to have been assumed that, because this note was signed by Woodin and Powers, for Woodin's accommodation, before Sweet signed it, therefore Sweet was the last indorser, and in that capacity entitled to look to Powers. The note appears to have been taken up by plaintiffs after its dishonor, with no transaction of purchase from the bank, and as a matter of course. The formality of striking out the special indorsement, or of having the name of the Old National Bank indorsed, is by the admission of the parties not material. But the testimony shows clearly that it was not meant as a purchase.

No one had any right to take it up but Powers or Sweet. Sweet, by putting his name above that of Powers, chose to make himself a joint maker with Woodin, and disqualify himself from recourse to Powers as liable to him in the order of time.[1] The case is in principle similar to that of *Greusel v. Hubbard*, 51 Mich. 95 (16 N. W. Rep. 248), where it was held that parties must sue and be sued on negotiable paper in the order in which they have seen fit to sign it. If Mr. Sweet had this note taken up, as seems to have been done, to remove his own liability, he might sue Woodin; but he could not sue Powers. The declaration did not set forth anything which would have authorized a suit on any other basis, as, being under the statute against the indorser as well as the maker, it must set forth a paper title accordingly,

[1] Sweet testified that he signed the note before it was negotiated, for Woodin's accommodation, that he might get the money on it.

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and this was not done, unless both plaintiffs represent Mr. Sweet. We are not called on to say whether a firm can buy paper on which one of its members is a joint maker, and sue the other maker and an indorser under the statute in a suit at law

We think the verdict was rightly ordered for the defendant Powers. The judgment must be affirmed.

The other Justices concurred.

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FRED H. WARREN v. THE BOARD OF REGISTRATION.

Elections—Qualifications of voters—Residence—Citizen having lodging in one ward and boarding place in another.

1. Where the only question of the residence of a voter for purposes of election is whether his lodging room or his boarding place governs, he should be registered where he boards.

2. The following propositions are summarized from the opinion of Mr. Justice CAMPBELL:

a—There can never, in the eye of the law, be more than one domicile of citizenship; and that continues, in the case of a citizen, till he himself renounces it absolutely, and takes up another in its stead; and such a domicile is not lost by absence in the State or out of the State, whether within or without the United States. *Harbaugh v. Cicott*, 33 Mich. 242.

b—Mere bodily presence or absence can have no effect in determining residence, when once existing.

c—Temporary abode in a city or ward does not make a person an elector. Unless the person coming in does so with the honest and settled intention of obtaining a new domicile, he gains no rights.

d—It is always to be remembered that a citizen who has elected his domicile is entitled to enjoy it. The only question is as to the particular action which indicates his choice.

e—The family or household, whether composed only of relations, or including, as it commonly does in law, all the members of the household, is the natural group of fellow-residents.

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f—Where long and inveterate usage has existed for half a century unchanged, it is of itself, unless repugnant to some principle, of great force as a public custom.

g—It must be remembered that the right of voting is one which cannot be taken away by direct law or impossible conditions.

h—The primary rule of elections must always be to save the voter his rights.

i—No one who is not a *bona fide* resident can eat himself into the quality of a voter. The period of residence required means actual and permanent sole residence, and not a few days' commorancy for the purposes of one election. A temporary resort to a precinct for no other honest purpose of residence is a fraud, and no residence, and gives no rights.

Mandamus. Submitted October 24, 1888. Granted October 25, 1888. Opinion filed November 1, 1888.

Relator applies for *mandamus* to compel respondents to register him as a voter in the Fourth precinct in the Second ward of the city of Detroit. The facts are stated in the opinion.

Fred H. Warren, in *pro. per.*, for relator.

John W. McGrath, for respondents.

CAMPBELL, J. In this case, which was one of urgency, it was impossible to prepare a written opinion before decision. But the confusion which seemed to exist in the minds of the board of registration makes it desirable to give our reasons, but as briefly as is consistent with the necessity of the occasion.

Relator was not denied or doubted to have chosen the city of Detroit as his actual and only domicile, and, being a citizen of the United States and of Michigan, it was open to him to choose it anywhere in the State or city. Being a citizen and qualified voter of Detroit, the only question to be determined is that of the ward and precinct in which he must be registered. It appears that

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he is a single man, not having any family relations in Detroit, and having no household of his own over which he presides, or of which, with some other head, he is a member. He has a separate lodging in one ward, and a boarding place in another. We held that in such a case as this, where the voter is a resident, and the only question of residence for purposes of election is whether his lodging room or his boarding place governs, he should be registered where he boards.

Had the question been merely one of statutory construction on this one subject, it would need but a few words to explain why we think the construction given is the proper one in this State, and especially in Detroit. But the somewhat extraordinary and technical notions which are stated on the argument to have prevailed on the subject make it proper to refer to some of those elementary principles which are often carelessly overlooked.

There can never, in the eye of the law, be more than one domicile of citizenship; and that continues, in the case of a citizen, till he himself renounces it absolutely, and takes up another in its stead. And such a domicile is not lost by absence in the State or out of the State, whether within or without the United States. In the case of *Harbaugh v. Cicott*, 33 Mich. 242, that doctrine was very fully explained, and applied to a registered elector in Detroit whose family had lived for some years in Royal Oak, where he paid them weekly visits. It was held that he could not lose his residence in Detroit, unless he intended to renounce it in fact, no matter how long he or his family might be away.

No light can be thrown on the subject by the technical rules applicable to dwellings. Burglary and arson are crimes against the habitation; and it has always been held that an inhabited house, or part of a house, might be a

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dwelling, if used as such at the time, or left with a purpose of returning. But no one ever imagined that a dwelling must be regarded as a domicile of citizenship. There is no legal difficulty in one man's owning as many dwellings, and in as many parts of the world, as his choice and means may enable him to buy or occupy. All are his dwellings, and are protected as such. But it is not impossible that none of them is his domicile in this sense. This subject of legal domicile, in the strict sense, is referred to in the case of *Rue High*, 2 Doug. 515, and *Campbell v. White*, 22 Mich. 178.

Our own Constitution is full on this subject, where it lays down expressly, what would perhaps be implied, that certain continuous presences or absences shall have no effect on elective residence. By Article 7, § 5, it is provided that no elector—

"Shall be deemed to have gained or lost a residence by reason of his being employed in the service of the United States or of this State, nor while engaged in the navigation of the waters of this State or of the United States, or of the high seas, nor while a student of any seminary of learning, nor while kept at any alms-house or other asylum at public expense, nor while confined in any public prison."

And by section 7 it is declared:

"No soldier, seaman, nor marine in the army or navy of the United States shall be deemed a resident of this State in consequence of being stationed in any military or naval place within the same."

These provisions do not prevent such persons from becoming residents, if such is their purpose, and if they are able to choose.

In the case of *People v. Blodgett*, 13 Mich. 127, where it was held that the language of the Constitution, as it then existed, prevented voting outside of the township or

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ward of residence, it was not suggested or imagined that absence from the ward lost a residence; and, in the amendment allowing soldiers in the field to vote, the vote, when taken, is to be credited to the place of residence. Mere bodily presence or absence can have no effect in determining residence, when once existing. There is probably not a precinct in any city which has not resident and qualified voters who spend most of their time in pursuits out of the ward or State; and persons who travel for pleasure or business, for long or short periods, do not loose their residence by such absence. Senators and Representatives and other persons often occupy residences in Washington, but they are not disfranchised for doing so. As explained in *Harbaugh v. Cicott*, a person cannot lose his residence, unless he voluntarily renounces it for another.

It is equally true that temporary abode in a city or ward does not make a person an elector. Unless the person coming in does so with the honest and settled intention of obtaining a new domicile, he gains no rights. There is nothing in the law which makes colonized voters, imported for present purposes, entitled to claim the privilege of voting.

The inquiry before us, as already suggested, is, which of the two, lodging or boarding, determines the act of residence, when not otherwise determined? It is always to be remembered that a citizen who has elected his domicile is entitled to enjoy it. The only question is as to the particular action which indicates his choice.

It cannot be said that, where a man is isolated from all home belongings, there can be any particular preference in nature between one criterion and another. It will probably be found that the same rule does not prevail everywhere; and in the absence of legislation it is

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therefore a question of usage and local understanding, more than of principle. In our opinion the long-settled law and usage in this State have made this matter, as applied to different wards and precincts of the same city, one of no great difficulty. The question naturally arose as soon as cities were divided into wards. Detroit was for many years the only city so situated. As far back as 1839, and possibly earlier, we find mention of the matter in "An act relative to ward elections in the city of Detroit, and for other purposes" (Laws of 1839, pp. 31, 32), containing this provision:

"The residence of an elector, under this act, shall be the ward in which he boards or takes his regular meals."

This exact provision continued in force till 1857, when the city received an entirely new and elaborate charter, wherein, by section 2 of chapter 3, it was made the voter's place of residence "where he takes his regular meals." This was amended in 1861 by making the district that—

"In which his family resides, or in which is his regular boarding-house." Laws of 1861.

This change, introducing family relations, was very probably called for by some narrow construction which some one had given to the law as it stood. The family or household, whether composed only of relatives, or including, as it commonly does in law, all the members of the household, is the natural group of fellow-residents. Under the law of nations, the embassador's family includes all the persons attached to or employed in the embassy, and shares his immunity. A man who has any species of family ties is usually identified in residence, unless having a contrary intent. But the provision as to persons having no such relationship was continued, in substance, as before. Several charter amendments cover-

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ing this section were afterwards made, but this was retained. In 1883 an entirely new charter was adopted, which, as we have had reason to discover, left out a good many things by evident carelessness, but retained this whole provision as to families and others, with no change in meaning. Local Laws of 1883, p. 585. In 1885 this section was recast, but these provisions were still kept. Local Acts of 1885, p. 286. In 1887 a change was made in the method of securing election inspectors, introducing radical changes, and departing entirely from the old charter methods; making, practically, an entirely new chapter on elections. By the substitution of this new system the old one dropped out; and in this way the chapter, which in its new shape has little or nothing to say about electors' qualifications, left no provision in force defining residence. Local Acts of 1887, p. 908. It is the silence of this new law which led the respondents to raise the question of relator's residence.

Had the old clauses been modified by simply dropping out the residence qualifications, and if this had appeared to be its purpose, it might, perhaps, have had some significance, if the part repealed had been a new innovation. But the change actually made was on entirely distinct matters; and it would be a rather strained construction which should assume any such radical purpose from mere silence. Where long and inveterate usage has existed for half a century unchanged, it is of itself, unless repugnant to some principle, of great force as a public custom. But here there was a legal determination begun under the old Constitution, and several times re-enacted under the new, with no legislative restriction or censure. A usage for so long a period, under express sanction of law, should be able to continue without further re-enactment, unless the legislative will is expressed to the contrary. There can be no presumption from mere silence, with no

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substituted rule on the subject. It cannot be presumed that any Legislature means to set up different rules of suffrage in different parts of the State, so as to create inequalities among voters. What was the rule in Detroit was presumptively admissible elsewhere, in the absence of a different one. And no such idea has been promulgated by authority.

On the other hand, the Legislature has on several occasions applied the same test elsewhere. In 1873 a law was passed providing uniform rules for the government of cities to be incorporated or re-incorporated, and not provided with specific charters of their own. Laws of 1873, p. 244; How. Stat. chap. 80. By that statute it was provided that—

"The residence of any elector, not being a householder, shall be deemed to be in the ward in which he boards or takes his regular meals." Section 2420.

From that time to this many cities have been incorporated, and made subject to the provisions of this act. In no instance that has been brought to our attention has any charter adopted a different rule. On the contrary, going no further back than 1881 for comparison, no legislative session has passed without incorporating this provision into several charters. It would not be of much use to hunt up all these charters. A few will suffice to show that each Legislature has held the same views. We find this provision, in 1881, in Stanton and Bay City (Local Acts of 1881, pp. 39, 177); in 1883, in Escanaba, Menominee, St. Ignace, and West Bay City (Local Acts of 1883, pp. 47, 160, 240, 340); in 1885, in East Saginaw and Port Huron (Local Acts of 1885, pp. 354, 479); and during the same session, and at or about the same time when the Detroit charter was last amended, the Legislature of 1887 enacted the same rule in Adrian and Sault Ste. Marie

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(Local Acts of 1887, pp. 141, 770). These are examples only. There is no contrary rule.

We do not feel justified in departing from what is so clearly indicated as the legislative understanding. Should we attempt doing so, it could only be to set up a rule of our own, for there is certainly no clearly-established legal rule to the contrary.

It would also be going beyond our province to try to determine what reasons exist in favor of one rule or another. It has not been found necessary to devise any statutory rule, except where one municipality is subdivided into smaller precincts for one purpose or another. It can make no practical difference, in principle, where officers represent an entire ward, in what precinct of that ward a citizen votes, if he is a resident of the ward and only votes once. A ward is the smallest election precinct required by the Constitution. But convenience requires some subdivision, and the registration system favors residence in a precinct as a test of capacity. Some persons may think a man's whereabouts most easily known, publicly, where he lodges. Others may think daylight knowledge more certain to be publicly held. Either rule would be competent for the Legislature, so long as no one is disfranchised. But where there is local voting and local registration it is necessary to have some criterion, and this is the one which prevails here.

There is not much need of discussing the metaphysical or exceptional possibilities of difficulty from unreasoning verbal criticism. They cannot be very numerous, and are chiefly imaginary. It must be remembered that the right of voting is one which cannot be taken away by direct law or impossible conditions. As already said, a man has a right to choose his domicile, and cannot be shut out of it. If sailors, travelers, public officers, or others, who have honestly chosen their domicile, cannot be found to

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come within the letter of any such provision as this, although there is less difficulty in it than extreme ingenuity might suppose, they cannot be disfranchised; and the rule must be applied, as it was meant to be applied, to cases where it can be. The primary rule of elections must always be to save the voter his rights. On the other hand, no one who is not a *bona fide* resident can eat himself into the quality of a voter. The period of residence required means actual and permanent sole residence, and not a few days' commorancy for the purposes of one election. A temporary resort to a precinct for no other honest purpose of residence is a fraud, and no residence, and gives no rights.

The *mandamus* has already been allowed.

SHERWOOD, C. J., CHAMPLIN and LONG, JJ., concurred with CAMPBELL, J.

MORSE, J., *(dissenting)*. The relator in this case is without question a resident of the city of Detroit, and entitled to be registered and to vote in said city. During his entire residence in said city he has taken his meals regularly at the Antisdel House, which is located in the Fourth precinct of the Second ward. For several months last past he has had his room, where he lodges, sleeps, and keeps his trunk, clothing, private library, and ornaments, at No. 69 John R. street, which is located in the Fifth precinct of the First ward. The relator is unmarried. The respondents, who constitute the election inspectors of the Fourth precinct of the Second ward, refused to register him as an elector, upon his application.

I cannot agree with the majority of the Court that Warren is a voter in the precinct in which he takes his meals. I attach no significance to the fact that the charters of the city of Detroit have heretofore contained pro-

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visions to this effect. The charter at present contains no clause determining what place shall be considered the residence of a voter. I am not authorized to assume that the Legislature left out the former provision by mistake. We must assume, if we assume anything, that the Legislature did what they intended to do.

The general registration law governing the registration in the townships of this State, has never, since the policy of registration of voters was adopted in this State, particularly specified what the word "residence" meant, as applied to voters. I must take it for granted that the Legislature intended that hereafter the residence of an elector in Detroit must be established as it would be under the general law. What is a man's residence? It is his home. Where is his home? Is it where he rushes in and hurriedly takes three meals a day; where he spends just time enough to eat? Or is it where he has his room, and keeps his personal goods and chattels; where he spends his evenings and Sundays among his books, and keeps his easy chair and other articles of personal comfort or adornment?

If the inspectors had asked the relator where his home was, I think he would have answered, No. 69 John R. street, instead of the Antisdel House. Warren had something more than a mere lodging, a bed, at No. 69 John R. street. He had an abode, a dwelling, a habitation, a home, at John R. street. These words are all synonymous with "residence." If Warren had been a married man, rooming with his wife at this place, although both of them took their regular meals at the Antisdel House, no one would assert that their home or residence was at the hotel. Nor is it any more the home of Warren because he is single. The domicile of Warren was in his room, the same as if, instead of occupying one room, he had owned or rented a house, and lived as a single man

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in it. This has been the common understanding and ruling under the general laws of the State throughout the State, as far as I have been able to learn of the ruling of election boards upon the question. It seems to me the only proper ruling, and one less liable to result in the perpetration of frauds in registration and in voting than the other.

In all the large cities in this country, many single men are living upon what is called the "European Plan." They have furnished rooms, and take their meals at no regular place; eating at some restaurant or hotel, wherever they may happen to be at meal times. Their homes are in their rooms, and not at the eating tables.

The election inspectors were right, and the *mandamus* ought not to issue.

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JAMES M. TURNER v. FREDERICK H. STEPHENSON.

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Adverse possession—Occupancy of portion of premises claimed.

1. Adverse possession, for the statutory period, of 40 acres of land, under a recorded deed covering the entire 160 acres, will not, of *itself*, give the occupant title to the land not so *actually* occupied.
2. In *Murray v. Hudson*, 65 Mich. 670, it was held that evidence of the adverse use, for the statutory period, of a parcel of land as a wood lot appurtenant to a farm, in the usual and ordinary way pertaining to the ownership of farm lands, was a good defense as against one claiming under the original title.

Error to Grand Traverse. (Ramsdell, J.) Argued May 9 and 10, 1888. Decided November 28, 1888.

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Ejectment. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Frank E. Robson, for appellant.

Pratt, Hatch & Davis, for defendant.

[The points of counsel and authorities cited are stated in the opinion.—REPORTER.]

MORSE, J. Action of ejectment.

The land in controversy, the S. ½ of the N. E. fractional ¼ of section No. 4, township 25 N., of range 11 W., and being 80 acres, belongs to the lands granted to the State under the swamp-land act of 1850. It was patented to the State in that year. In 1872 the State issued a patent under which, by mesne conveyances, the plaintiff claims title. The defendant, under the homestead law, located 160 acres, described in his patent as the N. E. ¼ of section No. 4, same town and range as the State patent to Turner. It will be seen that the 160 acres located by defendant as a homestead included the 80 acres claimed by Turner, and conveyed to his grantors by the State.

It was conceded that Turner had the better title of record, and must recover unless the defendant could avoid the same by showing adverse possession. Defendant actually entered into possession of his homestead in October, 1863, which possession has been continuous and uninterrupted since that time. But he lived and made his improvements almost entirely upon the north-west 40 acres. There was evidence tending to show that he made some clearing or chopping quite early upon some small portion of the south-west 40, which Turner claims, and he testified that in the last three years he has chopped about 10 acres upon it, and cleared 6 of the 10; also, that he paid taxes upon the whole 160, nearly, if not all

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of, the years since it became taxable, and has used the south-west 40 as a wood lot, and pastured his cattle thereon.

The circuit judge, and we think erroneously, instructed the jury that—

"The occupancy of the N. W. ¼ of the premises under a patent claiming the whole, and registered, was possession of the entire 160 acres. Therefore, if you find from the evidence that the defendant in this case has occupied that portion of the premises for the whole period, consecutively, of 20 years, adversely, openly, notoriously, and in defiance of the rights of the plaintiff, or the rights of any other parties, then he is entitled, under the law, to the premises, and your verdict will be for the defendant."

The question as to the payment of taxes, or the use or improvement of the land claimed by Turner, or any portion of the same, was by this direction eliminated from the case, and it is therefore unnecessary to determine what bearing such facts, if established, might have upon the question of title to the same in the defendant by adverse possession. The jury were clearly informed that, if the defendant had occupied the north-west 40 alone, for the requisite number of years, adversely to all the world, and under a recorded deed to the whole 160 acres, it was not necessary that anything should have been done upon the 80 acres claimed by plaintiff, or towards it, in order to hold it by adverse possession.

We cannot see how a man, by simply occupying his own land, the title to which is not disputed, can acquire title to another's land, simply because the deed to the land he occupies covers adjoining land, which he neither owns nor occupies. If so, then the mere recording of a deed would amount constructively to actual possession. The plaintiff in this case, or any other person, is not bound to suppose that a man occupying adjoining land

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to his own is thereby claiming title to or possession of his premises.

The cases cited by the counsel for defendant are hardly applicable to the case at bar. They are cases, as far as cited from this State, where there had been acts of user going further than the mere record of title. The 80 acres claimed by plaintiff, and the 80 acres upon the west 40 of which the defendant made his occupation, are distinct tracts of land, and so regarded by the general government, the source of the original title. These authorities might have some application to the proofs as made by the defendant on the trial, but they do not support the charge of the court, upon which, it must be presumed, the jury acted. *Murray v. Hudson,* 65 Mich. 670 (32 N. W. Rep. 889); *Youngs v. Cunningham,* 57 Id. 153 (23 N. W. Rep. 626); *Hardy v. Powell,* 40 Id. 415; *Campau v. Campau,* 44 Id. 33 (5 N. W. Rep. 1062). The same may be said of most of the other authorities cited. See *Fletcher v. Fuller,* 7 Sup. Ct. Rep. 677; *Public Schools v. Risley's Heirs,* 40 Mo. 370; *Davis v. Easley,* 13 Ill. 201; *Whitford v. Drexel,* 118 Id. 600 (9 N. E. Rep. 268); *Fussel v. Hughes,* 8 Fed. Rep. 396; *Murphy v. Doyle,* 37 Minn. 113 (33 N. W. Rep. 220).

In *Murray v. Hudson,* 65 Mich. 670, the parcel of land in issue had been used by Bryce, and those claiming under him, as a wood lot appurtenant to a farm, in the usual and ordinary way pertaining to ownership of farm lands; and this possession, being adverse for a sufficient length of time, was held a good defense to the original title. The other cases cited in this State are not analogous in their facts to the case under consideration.

In the case of *Murphy v. Doyle, supra,* the defendant acquired a tax deed to an 80-acre tract of land. The land was vacant and unimproved, and was all heavy tim-

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ber, except about eight acres of marsh. Claiming title to the whole tract under his tax title, Doyle entered upon the premises, and cleared and fenced a few acres the first year, and planted it with a crop. Each year thereafter he made additional clearing, until at the time of the suit he had in all some 30 or 40 acres inclosed and under cultivation. He also cut hay every year upon the marsh land, which he had drained but not fenced. Every spring he made sugar upon the uninclosed land. He paid taxes each year on the whole 80 acres. It was held that these facts constituted adverse possession of the whole tract. Doyle did not reside on any of the land.

It is stated in the opinion that where the occupant of land enters under color of title through a deed, he is presumed to have intended his entry to be co-extensive with the description contained in his deed, although the actual improvements are on only a portion of the land; and when there has been a continued occupation of some part of the land included in such conveyance he will be deemed to have been in the adverse possession of the whole of such premises, if not in the adverse possession of some one else. It is, however, stated, further, that this proposition is subject to the proviso that the premises described in the conveyance consist of a single tract of a proper size to be managed and used in one body, according to the usual manner of business of the country. But the holding was based upon the facts as before stated; it being considered that the 80 acres were within the ordinary size of a single farm, and that Doyle, except making his residence upon the land, had done all in the way of occupying the whole tract that the nature and condition of the property reasonably admitted of.

Under the direction of the circuit judge in the case at bar it was not necessary that the jury should find that Stephenson had ever used or touched in any way the land

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in controversy here, or paid taxes upon it, or asserted any dominion over it, if he had occupied and used any portion of the quarter section within which this 80 was included, under a deed of the whole. The mere occupancy of the north-west 40 acres, with no dominion exerted over the south 80, save what might be inferred from his deed, would not be sufficient to gain title by adverse possession. In such case there would be no notice, actual or constructive, to Turner, who holds the legal title, of any claim on the part of the defendant to the unoccupied 80. Turner might well suppose that Stephenson was only claiming title to the land actually occupied by him, or within the bounds of the smallest government subdivision. There would exist no circumstance or reason why Turner would be put on inquiry to ascertain whether his neighbors, living on and cultivating other parcels than his own, were claiming title to his lands.

Therefore it has been held that where a grantor embraced land to which he had no title in the same deed with that to which he had a title (as it is conceded the United States did in its deed to Stephenson), and the grantee entered upon and occupied that part only to which the grantor had a title, it did not operate as a disseizin of the owner of the other land described in the deed, *although such deed was duly recorded.* See 3 Washb. Real Prop. (5th ed.) marg. p. 498, and cases cited; *Hole v. Rittenhouse,* 25 Penn. St. 491; *Thompson v. Burhans,* 61 N. Y. 52, 69; *Tritt v. Roberts,* 64 Ga. 156.

We find no error in the record except as above stated. The judgment will therefore be reversed, and a new trial granted, with costs to plaintiff.

The other Justices concurred.

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JOHN M. LONGYEAR ET AL. v. HENRY H. APLIN, AUDITOR GENERAL, ET AL.

Taxes—Assessment in 1885 under law of 1882—Highways and bridges —Vote of tax by electors—Jurisdiction of commissioner to expend further sum.

1. An assessment of property, and its review, in the spring of 1885, made under the tax law of 1882, was valid, and such tax proceedings could be completed under the law of 1885. *Davenport v. Auditor General*, 70 Mich. 192.
2. The *labor* and *money* tax which the electors of a township are authorized to vote under How. Stat. § 1327, is not intended to meet anything but the ordinary improvement of the highways and bridges of the township during the year.
3. The right of the commissioner of highways to expend $1,000 in the building and repairing of bridges in his township during the year, and to cause said sum to be certified to the supervisor for assessment, under How. Stat. §§ 1379, 1380, is not affected by the voting of a labor and money tax by the electors under How. Stat. § 1327.
4. A record showing that a meeting at which the commissioner of highways and township clerk were present, "on footing the several amounts expended during the year in the construction and repairing of bridges in the township, it was found to amount to $1,000, whereupon the commissioner directed the clerk to certify to the supervisor such amount to be assessed to pay for such construction and repairing," is sufficient; and it will be presumed from such a record that orders had been issued under How. Stat. § 1380, and were before said officers, from which such footing was made, in the absence of some counter-showing.

Appeal from Ontonagon. (Williams, J.) Argued June 7, 1888. Decided November 28, 1888.

Bill to enjoin the sale of land for an alleged illegal bridge tax. Complainants appeal. Decree dismissing bill affirmed. The facts are stated in the opinion.

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Ball & Hanscom, for complainants.

N. W. Haire (*Stone & Gray,* of counsel), for defendants.

[The points of counsel are stated in the opinion.—REPORTER.]

MORSE, J. Case heard upon bill and demurrer in the Ontonagon circuit, in chancery. Demurrer sustained in that court, and complainants appeal to this Court. The controversy is in relation to the validity of a bridge tax levied upon the lands of the complainants in the township of Ontonagon, in the year 1885.

The case made by the bill shows, in substance, that at the annual township election held April 6, 1885, the following resolution was adopted by the electors present, to wit:

"That a labor tax of one-fourth of a day's labor be assessed upon each $100 of valuation for improvements of highways and bridges; also that a money tax of one-fourth of one per cent. be assessed upon each $100 of valuation for improvements of highways and bridges."

This amount so voted was duly spread upon the tax roll, and levied upon the lands with other taxes, which the complainants paid. The highway commissioner and overseers of highways of the township expended said labor and money upon the highways and bridges in said township in said year. But notwithstanding the fact of the raising and expenditure of this labor and money so voted by the electors, on the 2d day of October, 1885, the highway commissioner directed another tax, called a "bridge tax," to be certified to the supervisor for assessment and levy upon the lands in said township in said year; the record of which, and the only authority for levying the same, is as follows, to wit:

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"At a regular meeting of the board of highway commissioners, held at the clerk's office, October 2, 1885, the following were present: Daniel Cusick, highway commissioner, and James S. Monroe, township clerk.

"On footing the several amounts expended during the year in the construction and repairing of bridges in the township, it was found to amount to $1,000, whereupon the commissioner directed the clerk to certify to the supervisor such amount to be assessed to pay for such construction and repairing.

"[Signed] J. S. MONROE,
"Township Clerk."

This tax of $1,000 was levied on the lands in the township, and the county treasurer, under the direction of the Auditor General, was about to sell the lands of the complainants under such levy, when complainants filed their bill to enjoin such sale.

The complainants allege that the levy of this tax was unlawful—

1. Because the electors at the annual township meeting determined the amount they deemed sufficient for the improvement of highways and bridges, which sum voted by them was levied and paid in full, as far as the lands of the complainants are concerned; that after such vote the highway commissioner had no authority to raise any further sum.

2. That the record of the assessment of such tax by the highway commissioner is insufficient, in any event, under any law of this State, to confer authority to assess and levy it.

3. The tax being assessed in the spring of 1885, under the law of 1882, the lands of complainants could not be sold under the law of 1885.

This last objection was disposed of in the case of *Davenport v. Auditor General*, 70 Mich. 192 (38 N. W. Rep. 211), where it was held that the taxes assessed in the spring of 1885 could be collected under the law of 1885.

We think that the tax of $1,000 was a valid levy. The evident intention of the Legislature, as gathered

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from the statutes taken as a whole, seems to us to have been this: Under section 1327 of Howell's Statutes, a majority of the electors at the annual township meeting are to determine—

1. The amount of highway labor to be assessed.
2. The amount of money tax to be assessed,—the labor and money so assessed to be expended for "the improvements necessary to be made in the highways and bridges during the year."

Such labor assessment cannot exceed one-half day's labor upon each $100 valuation, and the money tax cannot exceed 50 cents upon the $100 of the same valuation. In case the aggregate valuation of the township is less than $50,000, the sum may be voted in gross, but must not exceed $250. See section 1326, How. Stat.

This labor and money tax was not intended to meet anything but the ordinary improvements of the highways and bridges. It cannot reach or cover the expenditures provided for under sections 1379, 1380, How. Stat., because in many townships the money and labor so levied would not amount to the $1,000 which the commissioner is authorized to levy and use under these sections. The building, rebuilding, or repairing, to any great extent, of the bridges, was intended to be covered by these sections as separate and distinct from the money raised for improvements of highways and bridges. The money to be raised by tax for this purpose, under section 1380, up to the amount of $1,000, is to be determined by the commissioner of highways, and not by the electors of the township. If more than $1,000 is required, then, under section 1381, provision is made for submitting the raising of such extra sum to the electors. See sections 1379–1381, How. Stat.

After the annual township meeting, it is not unusual

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for bridges to be swept away or damaged by floods or freshets, and it must be that the Legislature by these sections intended to give the commissioner of highways power to rebuild or repair them, independently of the action of the electors at the town meeting.

The record of the assessment of the tax is sufficient. It is not expected, and therefore not required, that every detail of the assessment, or the reason for it, shall be set forth in the record. No technicality can be invoked to defeat the tax. It is urged that under section 1380 the commissioner must draw his orders for the expense upon the township treasurer, and notify the clerk of such orders, and their amount, before the clerk can direct the supervisor to levy the tax; and that the record does not show that any orders were drawn. The record, however, shows that the township clerk was present with the commissioner, and—

"On footing the several amounts expended during the year in the construction and repairing of bridges in the township, it was found to amount to $1,000."

Thereupon the clerk certified that amount to the supervisor. It will be presumed upon such a record that orders had been issued according to law, and were before them, from which this "footing" was made, when nothing appears to the contrary. It was not necessary to set forth in this record the orders issued specifically, or to state that orders had been issued, when the record shows that the amounts expended were before them, and were footed up. It is to be presumed that the commissioner had followed the law in making these expenditures, in the absence of any allegation to the contrary in the bill.

The decree of the court below is affirmed, with costs.

The other Justices concurred.

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WILLIAM E. GATES, BY JAMES D. KNIGHT, HIS GUARDIAN, v. GEORGE CORNETT.

Contracts—Mental incompetency—Insanity—Equity—Burden of proof.

1. The burden of proof is upon the complainant to show his mental incompetency when he seeks to set aside his contracts on that ground.
2. When a party deals with a man whom he knows to be of weak intellect, and the good faith of such dealings is challenged, he has the burden of proof to show that no undue advantage was taken.
3. The law throws its protecting shield around mentally incompetent persons, from whatever cause, and while, in some cases, it is permitted them to make contracts so long as they are not under the restraint of guardianship, these are binding only so far as they rest upon adequate considerations, and are free from fraud or overreaching.
4. Distinctions have been recognized between cases of insanity and mere weakness of intellect or imbecility. Contracts made with insane persons have pretty generally been held void, and those made with the latter class, voidable merely.
5. Contracts which are voidable because of the weakness of intellect of a party can be enforced or repudiated in a court of equity upon equitable grounds. If they have been executed by one party, and are executory upon the part of the imbecile, they can only be set aside at his instance by his doing equity.

Appeal from Jackson. (Gridley, J.) Argued June 12, 1888. Decided November 28, 1888.

Bill to set aside mortgages on the ground of the alleged mental incompetency of the mortgagor. Defendant appeals. Decree reversed, and one entered for complainant in accordance with the opinion. The facts are stated in the opinion,

Thomas A. Wilson, for complainant, contended:

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1. Gates was an imbecile and mentally incompetent to manage his affairs at the time of the transaction involved in this suit. "No man supposed to be of sound mind would have been made such a mere puppet in dealing with his interests;" citing *McDaniel v. McCoy*, 68 Mich. 340.

2. A man may be capable of transacting some kinds of business, yet if incapable of transacting the particular business in hand, or that the nature of his property requires, he is held to be incompetent and of unsound mind; citing *Surley v. Sater*, 27 N. W. Rep. 262.

3. In determining as to his capacity to make a civil contract, the law will look rather at his substantial business acts than to his conversation, or occasional doings not connected with business; citing Buswell, Insanity, 227.

4. Evidence of improvident bargains and squandering a large fortune, taken in connection with particular acts of folly, connected with the management or disposition of his property, is competent; citing Buswell, Insanity, 227; *Hall v. Hall*, 17 Pick. 373.

5. It was competent to consider Gates' appearance in determining as to his mental condition; citing Buswell, Insanity, 229; *Daniel v. Daniel*, 39 Penn. St. 191.

6. The declaration of a party is evidence of his mental condition, whether made before or after the transaction; citing Buswell, Insanity, 231, 333, 245, 246; *Conely v. McDonald*, 40 Mich. 150; *Bates v. Bates*, 27 Iowa, 110; and the nature of the act itself may be considered as evidence of want of capacity; citing Buswell, Insanity, 239, 241.

7. Opinions of persons acquainted with the party are competent evidence as to his mental condition; citing Buswell, Insanity, 253; *Beaubien v. Cicotte*, 12 Mich. 459; and opinions may be founded upon a knowledge of the conversations and business transactions of a person, and are admissible; citing Buswell, Insanity, 255.

8. Cornett, when dealing with complainant, knew of his mental condition, and a contract cannot be made with an imbecile, except, possibly, for necessaries; citing *Mason v. Dunbar*, 43 Mich. 410.

9. When weakness of mind is shown, the burden is upon the defendant to show fairness of dealing; citing *Duncombe v. Richards*, 46 Mich. 166.

10. All that is necessary is such knowledge or circumstances as would put a prudent man upon inquiry; citing Buswell, Insanity, 301, 307; *Surley v. Sater*, 27 N. W. Rep. 262; *Bedford v.*

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Penny, 58 Mich. 424; *Jackson v. King*, 4 Cow. 207; *Crawford v. Scovell*, 94 Penn. St. 48; *Fay v. Burditt*, 81 Ind. 433; *Lincoln v. Buckmaster*, 32 Vt. 652.

11. Cornett is not entitled to enforce the notes, having taken them with notice of Gates' incapacity, or that he was being defrauded; citing *Surley v. Sater*, 27 N. W. Rep. 262; *Thallhimer v. Brinckerhoff*, 3 Cow. 623; *Jackson v. King*, 4 Id. 207; *Fay v. Burditt*, 81 Ind. 433; *Crawford v. Scovell*, 94 Penn. St. 48; *Crane v. Conklin*, Saxt. Ch. (N. J.) 346; *Woodfolk v. Blount*, 3 Hayw. (Tenn.) 147; *Hough v. Dickinson*, 58 Mich. 89.

12. Weakness of mind, though short of imbecility or mental incompetency, will be considered when fraud is charged; citing *Seeley v. Price*, 14 Mich. 546; *Wartemberg v. Spiegel*, 31 Id. 402; *Jackson v. King*, 4 Cow. 207; *Owings' Case*, 17 Am. Dec. 326; *Crane v. Conklin*, Saxt. Ch. 346; *Juzan v. Toulmin*, 9 Ala. 602.

13. It is not necessary to put the parties *in statu quo*, Cornett not having acted in good faith; citing Buswell, Insanity, 40, 416; nor is it necessary to return the consideration when the defendant had notice of the fraud, or the money has been squandered; citing *Machine Co. v. Barnard*, 43 Mich. 379; *Crawford v. Scovell*, 94 Penn. St. 48; *Churchill v. Scott*, 65 Mich. 485.

Marston, Cowles & Jerome, for defendant, contended that complainant had not made a case, and their brief is confined to a discussion of the testimony.

CHAMPLIN, J. The bill in this case was filed to set aside six real-estate mortgages and a chattel mortgage, aggregating $15,839.82.

It alleges that Gates has from his birth been a simple and weak-minded person, and since the death of his parents has been of unsound mind, foolish, idiotic, and mentally incompetent, and wholly unfit to have the care, charge, and management of his property, and utterly incapable of understanding the effect of bargains, or the adequacy or reasonableness of the considerations therefor; that he is, and has been during said time, incapable of forming an intelligent judgment of the value of services or property, and would pay whatever any person with

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whom he might chance to deal insist upon, without the slightest regard to the value of the same, or whether such services or property would be of the slightest value to him, and during all said time has been incapable of doing any kind of business in consequence of such mental deficiency.

That the defendant and certain other covetous, dishonest, and evil-disposed persons, well knowing the premises and Gates' mental condition, took advantage of his mental condition and infirmity to cheat and defraud him out of his property and estate; that defendant pretended to be a friend of Gates, and advised him in and about his business, but that such pretenses were deceitful, and were made for the purpose of more readily cheating and defrauding him out of his property by reason of said fraudulent notes, bonds, and mortgages; that said mortgages were obtained without any consideration, or, if there was a consideration, it was of trifling value; that the same were made and executed because the defendant required them, and induced Gates to believe that it was right and proper to make them, and that they were not the voluntary act of Gates; that, if any money was paid or loaned to Gates by defendant as part consideration for said mortgages, defendant knew the same would be of no use or value to complainant, Gates, and would be obtained by the person defrauding him.

That defendant claims that the consideration for such mortgages was largely and almost entirely notes of Gates, purchased by him from various persons; that such notes were fraudulent and void; that defendant did not purchase them in good faith, but knew their fraudulent charter, as well as Gates' mental infirmity and incompetency; that such notes were largely if not entirely without consideration; that there was an understanding between Cornett and the various persons who procured the notes

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that such persons should obtain the same, and that Cornett would pretend to, or actually, purchase the said notes, with the view of obtaining said mortgages from Gates; that there was an understanding and conspiracy between said defendant and those persons taking said notes from Gates to cheat and defraud said Gates of his entire property and estate; that all the real-estate mortgages contained a clause permitting the mortgagee to declare the principal and interest due upon 30 days' default in payment of interest; that the chattel mortgage was made payable before the interest would become due upon said real-estate mortgages, and included all of complainant's personal property, leaving him without means of paying such interest, with the intent thereby to render the payment of such interest impossible, and enable the defendant to foreclose said real-estate mortgages for the full value thereof; that by such dishonest practices of defendant and others acting in concert with him, Gates' property has become greatly reduced, and, if said pretended mortgages are allowed to stand and be enforced against complainant, he will be deprived of nearly, if not quite, all of his property, and be reduced to absolute poverty; that Gates was the owner and in possession of the property mortgaged.

The relief prayed for is that the mortgages, notes and bonds thereby secured, and other notes, be set aside, and said mortgages discharged of record, and that defendant be enjoined from enforcing them, and for general relief.

To this bill the defendant answered, neither admitting nor denying that the complainant was from his birth simple and weak-minded, but he denies that Gates, since the death of his parents, has been of unsound mind, foolish, idiotic, and mentally incompetent, as stated in said bill; avers that he has been, and still is, of sound mind, and competent to transact business, and to have

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the care and management of his property and estate; that, in all his business transactions between him and complainant, Gates showed and exercised ordinary intelligence in the same, and he (Cornett) had no reason to believe, and did not believe, and does not now believe, him to have been or to be incompetent; that he was perfectly capable of comprehending bargains and the reasonableness of considerations, and to transact business properly and successfully.

He admits the making and execution of the several mortgages set out in the bill, and says the one dated August 21, 1884, was for $2,000 money loaned at that time by him to Gates; that the consideration for the other mortgages was partly money loaned and partly for notes, which he had purchased, against Gates, at his request, and for his accommodation, and upon the promise that security should be given therefor. Denies having taken any advantage whatever of Gates, and denies all fraud, conspiracy, and evil-doing charged against him in the bill fully and particularly.

A large amount of proof was taken by testimony given in open court, and relief was granted to complainant nearly to the extent prayed for in his bill.

The court found as a fact, which is stated in the decree, that the complainant received from his parents an estate of upwards of $60,000; that he was then and ever since has continued to be mentally unsound, and incompetent to have the care and management of the same, and was defrauded of a considerable portion thereof by the defendant and certain other persons acting in concert with him; that the defendant, when he obtained the said notes and securities mentioned in the bill of complaint, and in all his dealings in reference thereto, had full knowledge of the incompetency of said complainant, and that he was so being defrauded of his property; that said obliga-

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tions and securities were obtained by the defendant for the express purpose of defrauding the complainant, and are without consideration, or, if any was paid, it was of inconsiderable or no benefit to Gates, by reason of the fraudulent schemes and conduct to defraud him of his property, to which the defendant was a party, and of which he had full knowledge, except some small sums amounting in the aggregate to the sum of $510; that the securities were fraudulent and void.

And it was decreed that each and all of the mortgages executed by Gates to Cornett, mentioned in the bill of complaint, including the chattel mortgage of $1,900, be set aside and held to be of no force or effect, except the mortgage executed January 5, 1884, for the sum of $1,306.-29, which mortgage was held to be a valid and subsisting lien for the sum of $510, with interest thereon from the date of said mortgage, being the sum of $104; making in all $614.

There is much testimony in the record of the opinions of witnesses as to the competency and incompetency of William E. Gates to transact business, but it is the conflict of opinion with opinion. The facts upon which such opinions are based lead us irresistibly to the conclusion that complainant is and has been always mentally incompetent to transact business, in the ordinary sense of that term. His mind is weak, and he lacks in judgment, and is incapable of forming an independent judgment of the value of services rendered by laborers, or of property. He is by no means an idiot. He attended the district school, and obtained a passable knowledge of arithmetic and penmanship. He could compute interest accurately, and, so long as his property remained in bonds and mortgages, he appears to have managed it without loss. During the life-time of his parents they deeded to him 80 acres of land. His father died in 1878, and his mother in 1879.

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He was the only child and heir, and after his parents' death he had the exclusive care and management of the estate, which descended to him. He was appointed administrator of the estate left by his mother, and gave the proper bond, with two sureties.

The inventory of this estate showed property amounting to $41,772.96, consisting of both real and personal estate; but the great bulk of the estate consisted of bonds, notes, and mortgages bearing interest. He had some other property aside from this left to him by his father. The exact amount, I think, does not appear; but after his mother's death he kept his money out at interest at good rates, and generally secured by first mortgages. When payments were paid he made his own computation of interest, and was generally accurate. He assigned and discharged mortgages. The only thing that he could do well was to loan money and re-invest it upon safe security. This kind of business he could do as well as ordinary persons, and showed no want of capacity. He could transact business with honest people without detriment or loss to himself, but easily fell a prey to the vicious and designing. In 1881 he sold a farm for $17,000, taking a $11,000 mortgage to secure a part of the purchase price. No claim is made that he did not obtain the full value of his property. He kept books of account. His credit was good among those who knew him, and he borrowed money at the banks. No one doubted his honesty, or refused to deal with him on the ground that he was mentally incompetent to transact business.

On the other hand, his appearance indicated a person whose intellect was below mediocrity. He was slow of speech, talked but little, hesitated when asked a question, and was slow of comprehension. He paid George Cornett, the defendant, $75 an acre for 120 acres of land, which, from the testimony of several witnesses, was worth

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not to exceed $55 an acre. He paid defendant's father $80 an acre for 100 acres, which the same witnesses valued at not to exceed $65 an acre. He paid George Cornett, the defendant, $300 for a horse, which was not worth to exceed $125. We have not overlooked the fact that defendant introduced testimony placing the value of the above property at nearly or quite to the figures which Gates paid, but we think the decided weight of testimony shows that Gates was overreached in these transactions with George Cornett. Of these particular transactions no complaint is made in the bill, and the facts are recited to show defendant's knowledge of Gates' incompetency to transact business.

He seems to have gotten along well enough while he was handling his bonds and mortgages, and until he conceived the idea that he wanted to carry on farming upon a large scale. At this time he owned between sixty and seventy thousand dollars in personal property. After selling a farm which he owned, in 1881, to William H. White, for $17,000, above referred to, he removed, in 1882, into another township, and bought several farms, aggregating over 521 acres, at a cost exceeding $39,000. He attempted to improve these farms, and in doing so lost the remaining portion of his property, and incumbered his land for about $15,000, and incurred a large amount of debts besides. He paid $1 a rod for ditching, some of which was sublet by the person taking the job at 60 cents a rod, and should not have cost more than 50 cents a rod. He paid $1 per stump for digging out stumps on his farm, which should not have cost more than 15 cents each. He paid 75 cents a rod for cutting the brush along the fences, which could have been done for from 5 to 15 cents a rod. He paid 15 cents a rod for filling in "hog holes" under his fences. A cent a rod would have been good pay. He loaned $3,000 on 60 acres of land that

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Potter bought of Dancer on the same day for that amount of money, when he knew that was all Potter paid for it; and the next year bought the same land of Potter, and paid him $4,000 for it in the same condition it was in when Potter bought. He paid William H. Cornett, a brother of defendant, 90 cents a tree for trimming apple and other fruit trees, which was not worth to exceed 15 cents each. He let a contract to William H. Cornett to dig out fast stone at $3 each, and another to Edmunds at $1 each, and it did not cost them 50 cents a stone to do what they did.

Edmunds worked for Gates by the month, and at the same time took contracts to do jobs upon his farms, out of which, in a little over a year, he made over $600 net profit. One job was to fill "hog holes" under a fence 40 rods long, at 15 cents a rod, and it took him one hour and a half to do the job; and Gates did not seem to comprehend that he was being cheated by paying $6 for work performed by this boy (who was only 20 when he was sworn) in one hour and a half. He paid $1,120 for "bogging" a marsh, that is, for cutting and removing them, the labor of which did not cost more than $40. He also paid $620 for doing a similar piece of work on a marsh, which could have been done for $50. He paid Edmunds $15 for fixing his wind-mill, which he got done for $3. He made a contract with James Hitchcock and Frank Lammers to put up clothes-line posts. There were to be 15 posts, and they were to furnish the wire, chop the posts from Gates' timber, and set them in the ground three feet. They were to peel off the bark, and Gates was to haul them. Gates gave them his notes for the job. They cut the posts, and he hauled them, but they never dug the holes or set them. These notes he thinks were sold to Cornett.

In 1883 he got new eaves-troughs put on his barn for

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9 cents a foot. In 1884 he paid Edmunds 18 cents a foot for repairing them, and measured them the whole length. He made a contract with William H. Cornett to pay him $3 a stone for taking out stone on his farm, which should not have cost more than 25 cents a stone. Charles Taylor, with a man and team, got out 80 of these stones in one day. Gates then paid 25 cents a hole for filling the holes with dirt where the stones were taken out. Five cents each would have been a large price. He paid $5 a rod for building a board fence, and he furnished the posts. A proper price would have been $1.50 a rod. And again, he paid $2.40 a rod for building board fence, and $1.50 a rod additional for the lumber that was used; and he paid $2.50 a rod for setting the posts for another fence. He also paid $1.40 a rod for laying up a rail fence. Another job, he paid $1 a rod for laying up rail fence, and borrowed the money at the bank to pay for it. Fifteen cents a rod would have been sufficient pay for any of this work.

He paid $40 for one gate, and $30 for another, and 18 others at $5 a piece; and the most of them are still lying around unused. He then paid $1 a gate for having the posts painted. He paid five cents a piece for splitting fence posts, and $5.50 a hundred for splitting rails, when $1 a hundred would have been a good price in either case. He paid Leverett Adams $300 for moving 40 rods of stone row, or at the rate of $7.50 a rod, worth not to exceed $50. He paid Lyons $3.50 a rod for laying up stone wall; worth $1.50 a rod to perform the work. He paid Adams $2.50 a rod for hauling stone for a wall, and, after it was laid, paid him $2.50 a rod for hauling away what stone there was left. He gave defendant a mortgage of $1,109 on his home farm as pay, several weeks in advance, for Cornett's brother and one Delos Cornwall in moving about 200 rods of stone, when $250 would have been a

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fair compensation, and, although he had paid for it once, he also paid Cornwall $400 as his share of the work before the work had been commenced, upon Cornett's order, and, as Gates claims, Cornett never allowed this order when he came to settle with him. He also says that the work was done in two or three weeks, and yet saw nothing wrong about it. He paid Benjamin Morris $1,800 for laying tile on about 10 acres of marsh, and it was done by five or six men in about three weeks. He then paid Frank Edmunds 50 cents a rod for filling the dirt back into the ditches.

This enumeration has already become tedious, and the subject is far from being exhausted. It may be summed up in saying that Gates was surrounded by a lot of unscrupulous men, who took advantage of his incompetency to transact business, who expedited his work of farm improvements by taking "star contracts" for every imaginable purpose, and when they had drained his purse of all his ready money, they called for and he gave them his notes of hand, at first payable in 30, 60, and 90 days, but later on upon 1 day's time, until he had incurred an indebtedness of over $15,000. And these notes defendant bought, and, when he had accumulated any considerable sum, he called upon Gates, and he would give a new note for the aggregate amount, and secure its payment by mortgage, and the original notes would then be destroyed, so that their identity is lost. These contracts were fraudulent, and the notes given therefor were obtained from Gates through imposition, and were void in the hands of the original holders, because of the fraud and imposition practiced upon Gates in obtaining them.

The testimony leaves no room for doubt that defendant well knew of Gates' infirmity, and that he was mentally incompetent to transact business in a safe or prudent manner for his own interests. He had known him from

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boyhood; had attended the same school; had lived in the same neighborhood. He had sold him a farm at an exorbitant price, and afterwards he sold the farm of his father to Gates at an exceedingly large price. His brother, William, did likewise. He saw the improvements that were being made upon the farms so purchased. He worked for Gates himself in building board fences. His brother, William, was one of the "contractors" who defrauded Gates, and who, it appears from defendant's testimony, informed him of Gates' critical financial condition, which induced him to take the last real-estate and chattel mortgages, and caused him to refuse to purchase any more notes. In 1880 or 1881, in presence of B. C. Hatch, Jr., he animadverted upon the act of Gates' father in leaving his property to a fool, and said that Gates did not know anything. In 1882 or 1883, while these improvements were going on, he asked James Sandford, a neighbor of Gates, how he (Gates) was running his business. Sandford told him that he did not know how Gates was running his business, but he saw he had plenty of help going back and forth past his house, and remarked to Mr. Cornett that he must be spending considerable money to keep things running in that way; and defendant replied that he—

"Supposed he had a large green bay tree loaded with mortgages, and occasionally, when he got out of money, he would pick one off, and go down and negotiate it and sell it; get the money for it to use in his business; he was making some good improvements there."

William Bishop met defendant at William Cornett's house in 1884, at the time William had a contract for getting out fast stones on Gates' land, and the subject of the way in which Gates was managing his farm came up, and George Cornett said that Gates was drawing stone from an inside fence for the purpose of outside fences,

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and was gutting the farm, and drawing them along outside of the road. Bishop asked if he was going to wall himself in, and Cornett said he did not know but what he was, and said that he was a ——— fool.

It appears from the testimony of Homer Frazer that during the time defendant was purchasing the notes given by Gates he told Frazer that he "bought notes of those fellows up there, and when he got enough of them he took mortgages;" that he gave Gates all the time he wanted at 8 per cent. interest. He also said that he could manage Gates as well as any one. The defendant, in his testimony, denies this statement, and says that Frazer wanted that he should try and sell the McKenzie farm to Gates, as he thought defendant had considerable influence with Gates, and could "work" him.

If Frazer's statement is true, defendant expressed his ability to manage Gates to suit his purposes. If, on the contrary, defendant's statement is correct, it shows that there was a belief in Frazer's mind that defendant could influence Gates' conduct in business matters; and we are satisfied from all the testimony that such was the fact, and that he exerted such influence to the prejudice of Gates in his dealings with him. It satisfactorily appears from the testimony that defendant knew of the mental incapacity of Gates. He knew that Gates was liable to be overreached in his business transactions. He knew what improvements Gates was making. He must have known that many of them were extravagant, and not such as prudent husbandry required. He was present at his brother William H. Cornett's house when William H. and Gates were figuring up the contract for the removal of fast stone, which was one of the greatest swindles perpetrated upon Gates by any of the contractors.

Defendant knew that Gates was calling for and using

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large amounts of money, such as indicated great extravagance, if he was not being cheated. Gates was a man of reputed wealth, and defendant regarded him as wealthy, and that he had only to convert some of his mortgage securities to enable him to pay for the improvements he was making. When a man of such weak intellect suddenly turns from an investor to a borrower, and gives his notes for current expenses in carrying on and improving his farm, and borrows such large and frequent sums of money as defendant claims he did of him, it challenges credulity to believe that a person knowing him and dealing with him as defendant did, could close his eyes to the existence of the facts, and say that he was unaware of any advantage being taken of Gates by the numerous contractors, or that he was not a sharer in the plunder secured. That he had the unbounded confidence of Gates is manifest from the fact that Gates went to him for counsel, advice, and assistance when it was rumored that steps were to be taken for the appointment of a guardian over him. He assisted in opposing such appointment, and later was active in efforts to remove such guardian.

The extent of defendant's influence over Gates is shown by the latter's testimony, wherein he states that certain notes were reckoned in against him twice in his settlements with defendant, and others were raised,—one from $60 to $600,—by whom he does not know, but he suffered defendant to figure them in at their raised amount, and said nothing about it to defendant, because he was afraid, and did not want to have any trouble with defendant.

The burden of proof was upon the complainant to show mental incompetency, and we think it has been made out. When a party deals with a man whom he knows to be of weak intellect, and the good faith of such dealings

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is challenged, the burden of proof is with the party who has dealt with the weak-minded person to show that no undue advantage was taken. The law throws its protecting shield around mentally incompetent persons, from whatever cause, and while, in some cases, it is permitted them to make contracts so long as they are not under the restraint of guardianship, these are binding only so far as they rest upon adequate considerations, and are free from fraud or overreaching.

Distinctions have been recognized between cases of insanity and mere weakness of intellect or imbecility. Contracts made with insane persons have pretty generally been held void, and the latter voidable merely. Gates' case falls within the last category. His contracts were not absolutely void. To so hold would be to unsettle titles, and overthrow a long series of business transactions in which complainant was engaged during eight years, without securing any benefit to Gates, and to the detriment of a great many persons who dealt with him in the utmost good faith, and without cheating him. Belonging, as his contracts do, to that class which are termed "voidable," they can be enforced or repudiated in a court of equity upon equitable grounds. Where the contracts have been executed by one party, and are executory upon the part of the imbecile, they can only be set aside at his instance by his doing equity. The maxim applies here, that he who asks equity must do equity.

The defendant is entitled to no greater consideration than the parties were from whom he purchased notes. Some consideration entered into these notes which was beneficial to complainant, Gates. Stones were removed from his fields, fences built, marshes cleared and drained, other improvements were made, and the value of his farm enhanced. Lands, which complainant's witnesses valued,

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before these improvements were made, at from $60 to $65 an acre, were shown, after the improvements were made, to be worth from $90 to $100 an acre. It would not be equitable or just to permit complainant to retain the entire benefit of these improvements, and at the same time deprive defendant of the money he invested in these notes at the request of the complainant, to enable him to make them. There is no testimony in the case showing that defendant advised Gates to enter into these contracts, or to make these improvements. In the present case equity will be done by complainant paying defendant what the benefit to his farm has been by enhancing its value in making the improvements. The testimony is not as clear and definite upon this point as we could wish. If we fail, through insufficiency of testimony, to allow defendant as much as we ought, it will be owing to his own fault in not furnishing the proof.

It was suggested upon the argument that, if the testimony was not sufficiently definite upon this subject, a reference should be ordered to take further proofs. The record is already voluminous, covering over 1,300 printed pages, and we shall not order a reference, but shall arrive at the best conclusion we can from the testimony before us, and, without referring to particular portions, merely state the result of our investigation and consideration.

We think the benefits received by the complainant on account of the improvements represented by the notes and mortgages set up in the bill of complaint, including the money loaned by defendant to complainant to pay taxes, are equivalent to the note and mortgage dated December 18, 1884, namely $5,534.82, and this mortgage may stand as a valid security for that amount, but to draw interest only at the rate of 6 per cent., the now legal rate of interest, from date. The other notes and mortgages set forth and described in the bill are declared null and void,

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the notes to be surrendered up to be canceled, and the mortgages to be discharged of record. The mortgage of $5,534.82 will be discharged by defendant on payment, with interest at 6 per cent., which may be done at any time at or before maturity. But no proceedings shall be taken to foreclose said mortgage within 90 days after the transcript in this cause is remitted to the court below. Complainant to recover his costs of both courts, to be taxed.

The decree of the circuit court will be reversed, and a new decree entered here in accordance with this opinion.

MORSE, CAMPBELL, and LONG, JJ., concurred with CHAMPLIN, J.

SHERWOOD, C. J. This case presents a most unconscionable state of facts,—a system of fraud practiced upon this incompetent and almost imbecile complainant, deserving of the severest condemnation. It is a hard state of things indeed when the law must be so construed as not to protect the weak and unfortunate, whether in capacity or fortune, from the avarice, rapacity, and fraud of designing and unconscionable men.

I am not able wholly to agree with what my Brother CHAMPLIN has written in this young man's case. I think the record shows him entirely incompetent to have the care and management of his property, or to transact business relating thereto, and his contracts should be held void. I know of no law requiring us, or any other court, to create or direct the enforcement of a contract made in the interest of a claimant through the frauds he has committed in dealing with such an incompetent, and it seems to me that this is precisely what we do when we recognize the claims made by the defendant, and decree a lien in his favor securing the same against the property of this incompetent.

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This is not a case where the person dealing with the incompetent did so in good faith, nor does it appear that the dealings had with him were necessary, or for his benefit. I think the notes and mortgages should be declared void, and be delivered up to be canceled.

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ALFRED L. CHESEBROUGH v. HAZEN S. PINGREE ET AL.

Landlord and tenant—Lease—Destruction of buildings by fire—Statute of frauds—Principal and agent.

1. Where the exclusive possession of land occupied by leased buildings is necessary to the enjoyment of the demise, the land passes as an incident.
2. A lease of land for more than one year, executed by an agent without written authority and delivered to the lessee, is void under the statute of frauds and is not validated by the after execution of a duplicate by the principal, of the existence of which the lessee has no knowledge.

Error to Wayne. (Reilly, J.) Argued June 12, 1888. Decided November 28, 1888.

Assumpsit for rent. Defendants bring error. Reversed. The facts are stated in the opinion.

Isaac Marston, for appellants, contended:

1. Affidavits denying the execution of written instruments should be construed liberally, where they seem in good faith intended to raise the question of execution; citing *McCormick v. Bay City*, 23 Mich. 457; *Haight v. Arnold*, 48 Id. 512; *Wren v. McLaren*, Id. 197; *McRobert v. Crane*, 49 Id. 483; and the execution under this rule has reference to the actual making and delivering; citing *Burson v. Huntington*, 21 Mich. 430, 431; *Freeman v. Ellison*, 37 Id. 462.
2. The lease must be signed by the lessor; citing How. Stat. § 6179,

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6181; *Abel v. Munson*, 18 Mich. 312; *Maynard v. Brown*, 41 Id. 298; or by his agent, authorized in writing; citing *Palmer v. Williams*, 24 Id. 331; and a ratification must be in writing; citing Id. 333.

3. Leases void under the statute are void for every purpose; citing *Hillebrands v. Nibbelink*, 40 Mich. 646; How. Stat. p. 1601 (note).

4. Upon the question of the effect of the destruction of the buildings upon the lease, conceding its validity, counsel cited *Freeland v. Bush*, 1 Term Rep. 701; *Stockwell v. Hunter*, 11 Metc. 448; *Coogan v. Parker*, 16 Am. Rep. 679; *Winton v. Cornish*, 5 Ohio, 477; 2 Bac. Abr. Lease, "K;" 2 Black. Comm. 19; *Harrington v. Watson*, 50 Am. Rep. 465; *McMillan v. Solomon*, 42 Ala. 356; *Bank v. Boston*, 118 Mass. 125; *Ainsworth v. Ritt*, 38 Cal. 90; *Kerr v. Exchange Co.*, 8 Edw. Ch. 315; Taylor's Land. & Ten. § 520.

5. In all the common-law cases where the tenant was held liable, it does not appear that he made any effort to rescind the lease or surrender possession, and his liability was put upon this ground; citing *Coogan v. Parker*, 16 Am. Rep. 666, 674; but defendants disclaimed any possession or right thereto, and plaintiff afterwards offered to sell the property, and give immediate possession, and this was an acceptance of defendants' surrender; citing Taylor's Land. & Ten. § 514 (note), 515; *Murray v. Shave*, 2 Duer, 183; and a rescission may be implied from the acts and circumstances; citing Taylor's Land. & Ten. § 515; *Day v. Watson*, 8 Mich. 536.

6. Evidence of the landlord negotiating with third parties for a new letting is competent, upon the question of a surrender in fact; citing *Hill v. Robinson*, 23 Mich. 25; *Donkersley v. Levy*, 38 Id. 58; *Jacobson v. Miller*, 41 Id. 100; *Logan v. Anderson*, 2 Doug. 102, and cases cited.

7. Where the defense is directed at the very existence of a promise having legal force, it is admissible under the general issue; citing *Snyder v. Willey*, 33 Mich. 489; *Ingalls v. Eaton*, 25 Id. 32; *Berringer v. Iron Co.*, 41 Id. 307; *Kinnie v. Owen*, 1 Id. 250, 251.

George W. Radford, for plaintiff, contended:

1. The lease was a lease for years of the land covered by the buildings; citing *Allen v. Scott*, 21 Pick. 25; *Bacon v. Bowdoin*, 22 Id. 401; *Winton v. Cornish*, 5 Ohio, 477; *Rogers v. Snow*, 118 Mass. 118; *Hooper v. Farnsworth*, 128 Id. 487; *Gear v. Barnum*, 37 Conn. 229; *Ammidown v. Ball*, 8 Allen, 293; *Boston v. Richardson*, 13 Id. 146; *Winchester v. Hees*, 35 N. H. 43;

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Wilson v. Hunter, 14 Wis. 683; *Bussman v. Ganster*, 72 Penn. St. 285; *Lanpher v. Glenn*, 33 N. W. Rep. 11.

2. The destruction of a building by fire does not cancel the tenant's liability to pay rent, where he has leased the whole building, and covenanted to pay rent for the term, without reservation; citing, in addition to cases before cited, *Fowler v. Bott*, 6 Mass. 63; *Kingsburry v. Westfall*, 61 N. Y. 356; *David v. Ryan*, 47 Iowa, 642; *Harris v. Heackman*, 17 N. W. Rep. 592; *Viterho v. Friedlander*, 7 Sup. Ct. Rep. 962; *Bussman v. Ganster*, 72 Penn. St. 289; Wood's Land. & Ten. § 451; Taylor's Land. & Ten. §§ 329, 375.

3. The case is taken out of the statute of frauds both by ratification and part performance, and there is no force in the claim that the lease was not executed and delivered; citing *Campau v. Lafferty*, 43 Mich. 429; *Hammon v. Hannin*, 21 Id. 381, and cases cited; Wood's Land. & Ten. § 133; *McIntyre v. Park*, 11 Gray, 102; *Holbrook v. Chamberlain*, 116 Mass. 161.

4. A surrender of a lease must be specially pleaded; citing Chit. Pl. 515; and in this case the proof of surrender was offered for the purpose of claiming a release from the covenants in a manner not provided in the lease, and was inadmissible under the general issue; citing *Rawlings v. Cole*, 67 Mich. 431; How. Stat. § 7363; *Miller v. Finley*, 26 Mich. 249; *Wheeler v. Curtiss*, 11 Wend. 654; *Bank v. Weed*, 19 Johns. 300; *Hollister v. Bender*, 1 Hill, 150; 1 Chit. Pl. 506.

LONG, J. This is an action of *assumpsit*, brought to recover rent under a written lease dated May 1, 1886, made by plaintiff to defendants, of certain property in Detroit. The plaintiff's declaration is upon the common counts in *assumpsit* and the covenants of the lease. Plea, general issue and affidavit denying the execution of the lease. At the trial the court directed a verdict for plaintiff for the amount claimed. Defendants bring error.

The defendants are partners under the firm name of Pingree & Smith, manufacturers of shoes. They had occupied the premises for a number of years prior to the making of the lease in question. During such prior tenancy the property was assigned to plaintiff through par-

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tition proceedings, and he had been the owner three or four years.

This first leasing expired May 1, 1886. The lease in question was prepared by Mr. Radford, acting as the attorney for plaintiff, two copies exactly alike being drawn, both taken by Radford to the office of Pingree & Smith about May 1, 1886. The lease was signed "Pingree & Smith," by Mr. Bond, who was then a member of the firm. The other copy was signed, "A. L. Chesebrough, by Geo. W. Radford, his Attorney." Both copies, after being so signed, were left at the office of Pingree & Smith, with Mr. Bond, with the understanding that he was to keep them until Mr. H. S. Pingree returned from the East. A few days later one copy of the lease was delivered by Mr. Bond to Mr. Radford for A. L. Chesebrough, and Mr. Chesebrough signed his name to the copy left with Mr. Radford a day or two thereafter. The other copy was retained by Pingree & Smith, and not signed by Mr. Chesebrough, but was signed by Mr. Radford as attorney for Mr. Chesebrough.

The defendants remained in possession, and paid rent to the plaintiff, from and after May 1, 1886, up to and including the month of March, 1887, when the buildings were totally destroyed by fire, on March 30, 1887. The property has remained in the same condition as left by the fire up to the time of the trial.

The morning after the fire, March 31, 1887, Mr. Radford wrote the defendants as follows:

"Some time since one of your company stated to me that if the Chesebrough land was vacant you would be more willing to purchase than with the buildings on it. Last night's fire has accomplished the change desired, and I am now ready to talk sale of site to you."

No reply was made to this by the defendants. Defendants had paid rent up to and including the month of

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March, 1887, and the rent for April became due, according to the lease, May 1, 1887. On May 4 Mr. Radford again wrote the defendants:

"Please inform me of the earliest time you can talk over the subject of buying the Chesebrough lot. In case you do not care to buy at all, let me know that, also, and what, if any, adjustment you wish to make as to the unexpired lease."

No reply was made to this communication by the defendants, but they, on May 11, 1887, wrote the plaintiff:

"The store buildings Nos. 11, 13, 15, and 17 Woodbridge street west, in the city of Detroit, under lease from you, dated May 1, 1886, having been totally destroyed by fire on the 30th day of March last past, and we being unable, therefore, to have, and not having or claiming, the use, occupation, or possession of the land, or any part thereof, upon which said buildings were situated, under said lease, and having removed all and singular our property, except one boiler, from off the land upon which such leased premises stood, we consider our liability under said lease at an end," etc.

Mr. Radford replied to this, claiming that the lease was not extinguished by reason of the total destruction of the buildings.

It appeared upon the trial that on June 8, 1887, the plaintiff made the following written proposition to one Richard Tregaskis for sale of the property.

"Richard Tregaskis is hereby given the refusal to buy the lot, 80 by 100 feet, on the south-east corner of Woodbridge and Griswold streets, for the sum of $24,000 cash, until Saturday noon, June 11, 1887.

"[Signed] GEO. W. RADFORD, for the owner.

"Also all material, such as brick, iron pillars, foundation, and stone copings, etc., boiler and engine excepted, and can commence to build as soon as papers are completed. [Signed] A. L. CHESEBROUGH."

There was no evidence given on the trial that Mr. Tregaskis made any reply to this offer of sale, or in any

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manner indicated that he accepted such proposition, and no sale was in fact made.

On July 8, 1887, plaintiff made written demand for the payment of the rent for April, May, and June, 1887, which is the portion of the rent sought to be recovered in this suit, and for the amount of which the court below directed a verdict for the plaintiff.

It is insisted by counsel for defendants—

1. That the proposition made by the plaintiff to Richard Tregaskis for the sale of the premises in question was an acceptance of the surrender made by defendants.
2. That the lease was of the buildings only, and not of the lands upon which the buildings were situate.
3. That the buildings having been destroyed by fire, their liability for rent ceased.
4. That, the lease not being signed by Mr. Chesebrough, and Mr. Radford not having authority in writing to sign the same, it was void under section 6179, How. Stat.

The buildings covered the whole land. The lease was for those certain store buildings known as Nos. 11, 13, 15, and 17 Woodbridge street west, said stores having a frontage of 80 feet on Woodbridge street and 110 feet on Griswold street; together with all and singular the benefits, liberties, and privileges to said premises belonging, etc.

We think the lease was for the whole premises, and not of the buildings alone. It is evident that the exclusive possession of the land was necessary to the enjoyment of the demise, and in such cases the land passes as an incident to the demise. *Allen v. Scott*, 21 Pick. 25; *Bacon v. Bowdoin*, 22 Id. 401; *Winton v. Cornish*, 5 Ohio, 477; *Hooper v. Farnsworth*, 128 Mass. 487; *Lanpher v. Glenn*, 33 N. W. Rep. 11. As we view the case, however, this question does not become important.

On the trial it appeared that the lease held by defendants was never signed by plaintiff, and the fact that the

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duplicate retained by Mr. Radford was signed by the plaintiff never came to the attention of the defendants until the time of the trial. It also appeared that Mr. Radford had no authority in writing from the plaintiff to sign the lease left with Mr. Bond for the defendants.

How. Stat. § 6179, provides:

"No estate or interest in lands other than leases for a term not exceeding one year, nor any trust or power over or concerning lands or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by some person thereunto by him lawfully authorized by writing."

From the fact that Mr. Radford had no authority in writing, signed by Mr. Chesebrough, the lease signed by him as attorney for Mr. Chesebrough, and left with the defendants, had no force, and the defendants could have asserted no rights under it against the plaintiff. Mr. Radford had authority to lease the property, and his acts would have been binding upon Mr. Chesebrough for the leasing for one year; but the statute above cited is express that no interest in lands, other than leases for a term not exceeding one year, can be created, unless the agent be authorized by writing to convey such interest. This statute covers every case where an interest in land is to to be divested by act of the party. *Whiting v. Butler*, 29 Mich. 144.

The fact that the duplicate retained by Mr. Radford was afterwards signed by the plaintiff does not aid the plaintiff's case. That duplicate was never delivered to the defendants, and they had no knowledge of its existence until at the time of the trial. It is not like the case of *Campau v. Lafferty*, 43 Mich. 429 (5 N. W. Rep. 648), where each party signs the lease delivered to the

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other, and does not sign the one he keeps. Here Mr. Chesebrough never delivered the lease signed by himself, and though Mr. Radford signed it as his attorney, he was not authorized in writing. The case comes clearly within the statute.

The defendants did not take possession under this lease. They were already in possession, and had been for a long time, paying the same rent in the same manner. It is contended by the plaintiff that the destruction of the buildings does not terminate the lease. The lease shows that it is a covenant to pay rent for the full term of three years, without any provision for its termination in case of fire. We need not, however, discuss this question. As we have already said, the lease in question was not one which could in any manner bind the defendants for the term, and the defendants' possession of the premises, or continuance in possession, was not dependent upon the written lease. Whatever rights the defendants had in the premises grew out of their former holding, and the permission to remain in, granted by Mr. Radford, as agent for the plaintiff. It was such a holding as the plaintiff might terminate at any time with proper notice, and could not in any event extend beyond one year without plaintiff's consent.

The rent was payable in monthly installments of $266.67. It was paid in full to and including the month of March, 1887. The buildings were destroyed on March 30, 1887. We think, the destruction being total, that the tenancy terminated at that time under the circumstances here stated. What the effect would have been upon the question of the continuance of the tenancy had the lease been a valid one for three years, with no provision for its termination in case of total destruction of the buildings by fire, we do not determine. It is sufficient to say that, there being no written lease effective and valid between

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the parties, their rights are determined under the circumstances of a parol leasing, which could not extend beyond one year, and which could have been terminated by proper notice, the rent being payable in monthly installments.

The judgment of the court below must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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THE PEOPLE, EX REL. FRANK M. HART, v. FRANK MCELROY ET AL.

Constitutional law—Legislative journals—Report of substitute after expiration of fifty-day limit—Reading bill by title.

1. It was held in *Attorney General v. Rice*, 64 Mich. 385, that parties could not stipulate or agree, or admit by pleading, that a statute was not properly or constitutionally passed by the Legislature, nor could parol proof be used for that purpose.
2. Without determining how far the legislative journals may be used to impeach duly authenticated acts of the Legislature, the courts certainly ought to have the right to open said journals to ascertain whether the fraud or mistake of some clerk or employé of the Legislature, or its committees, has not imposed upon the statute-books a different law from the one actually passed, or to determine whether the requisite number of votes were given under the Constitution to pass a law, when that instrument requires that the ayes and noes shall be entered upon the journals.
3. If the *object* of an act of the Legislature is fully expressed in its title as *passed*, the form or *status* of the title during any of the preceding stages of legislation is immaterial.
4. A substitute cannot be considered a new bill. Art. 4, § 28, Const.
5. The legislative practice of reading a bill twice by its title, and only once at length, has been maintained too long in this State to be now overthrown by the courts.

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Error to St. Clair. (Canfield, J.) Argued June 14, 1888. Decided November 28, 1888.

Information to test the validity of the act incorporating Marine City. Respondents bring error. Reversed, and judgment entered for respondents. The facts are stated in the opinion.

B. C. Farrand, Prosecuting Attorney (*Avery Brothers,* of counsel), for relator.

Atkinson, Vance & Wolcott, for respondents.

[The points of counsel are stated in the opinion.—REPORTER.]

MORSE, J. The prosecuting attorney for the county of St. Clair filed an information in the circuit court for that county to test the validity of Act No. 500 of the Local Laws of 1887, purporting to incorporate the city of Marine City, in said county.

The defendants are officers of said city, elected and holding public offices by virtue of said act.

The act is claimed to be void because it was not introduced in the Legislature until after the expiration of 50 days, and was not read but once in the lower house of the Legislature, and was not read three times, as the Constitution requires.

The replication to the plea of the respondents sets forth that the session of the Legislature of 1887 began on January 5; that on February 18 a bill, denominated "House Bill No. 491," entitled—

"A bill detaching certain lands from the township of Ft. Gratiot, in the county of St. Clair, and organizing the same into a new township, to be known as the township of 'Huronia,'"—

Was introduced by Representative Wellman, and referred

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to the committee on towns and counties. The bill was discharged from this committee, May 26, and referred to the committee on municipal corporations, May 27. This last committee reported a substitute for said bill, which substitute was entitled—

"A bill to incorporate the city of Marine City, in the county of St. Clair, and to repeal Act No. 328 of Local Acts of 1885, entitled 'An act to re-incorporate the village of Marine City,' approved April 23, 1885."

The substitute was at once placed on the general order, and on June 3 discharged from such order, and under a suspension of the rules passed, and ordered to take immediate effect. On the same day it was sent to the Senate, and there passed, after but one reading, under a suspension of the rules, and the order for immediate effect concurred in. It was returned to the House, and on June 7 referred to the committee on engrossment and enrollment. Being duly enrolled, it received the signature of the Governor, June 8, 1887.

It is claimed under these circumstances, in said replication, that the bill as passed was not introduced in either house of the Legislature until May 27, 1887, when it appeared as a substitute in the report of the committee on municipal corporations; that the substitute was in no way germane to the subject-matter of said house bill 491, as introduced in the first place, and that the territory embraced within the township of Fort Gratiot does not include any of the territory incorporated in Marine City by the substitute.

After the filing of this replication, the respondents obtained leave to file an amended plea and answer, and did so. In this amended answer they set forth the act under which the city was organized, and averred its proper and correct passage by the Legislature according to law, showing the certificate of the proper officers that

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it passed both houses, and was ordered to take immediate effect; also the approval of the Governor, and the certificate of the Secretary of State that it had become a law. It also appears upon the statute-books as one of the local acts of 1887. See Local Acts of 1887, p. 665.

To this amended plea and answer the prosecuting attorney replied that—

"Act No. 500 of the Laws of 1887 is not, and never has been, of any validity or force, and is now and always has been, void and of no effect, because the same was not introduced into or brought before the said Legislature until after the expiration of more than fifty days from and after the commencement of said session, and because the same was only read once in the lower house of said Legislature, and was not read therein three times, as the Constitution of this State requires,"—

And set forth the same, with other matters not necessary here to be mentioned, as causes of demurrer to said plea and answer. The respondents joined in said demurrer, and prayed the quashing of said information

Upon the hearing, the journals of the two houses were used, and it was shown therefrom the state of facts set forth in the replication, except that the bill, before it was referred to a committee, was read twice by its title, and the substitute once at length before its passage, in the House, and also that the bill, in the shape of the substitute, was read twice by its title, and once at length, in the Senate before its passage.

We held, in *Attorney General v. Rice*, 64 Mich. 385 (31 N. W. Rep. 203), that parties could not stipulate or agree, or admit by pleading, that a statute was not properly or constitutionally passed by the Legislature, and that no parol proof could be used for that purpose. In that case we took judicial knowledge of the contents of

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the legislative journals, and found no flaw in the passage of the act then under consideration.

But it is held by reputable authority, and with some show of reason, that courts cannot look beyond the enrolled act to ascertain whether the Constitution has been complied with in its passage. If the act, as in this case, is authenticated by the signature of the presiding officers of both houses, approved by the Governor, and certified in the published laws by the Secretary of State, it is declared by the courts of last resort in many of the states that the court will not go behind these certificates, and search further to ascertain whether such facts existed as gave these officers constitutional warrant for their action. *State v. Swift*, 10 Nev. 176; *Evans v. Browne*, 30 Ind. 514; *Sherman v. Story*, 30 Cal. 256; *Bender v. State*, 53 Ind. 254; *Pangborn v. Young*, 32 N. J. Law, 41; *Duncombe v. Prindle*, 12 Iowa, 1; *Eld v. Gorham*, 20 Conn. 8; *Railroad Co. v. Governor*, 23 Mo. 353; *People v. Devlin*, 33 N. Y. 269.

The courts of some of the states have taken cognizance of the journals, and looked into them, for the purpose of determining whether the constitutional methods have been followed in the passage of laws. But it is held, in all the cases, that the presumption is always strong that the legislature has not violated the constitution in the passage of an act, duly authenticated, as stated above; and that the proof furnished by the journals must be clear, in order to overcome this presumption. *State v. Peterson*, 38 Minn. 143 (36 N. W. Rep. 443); *Miller v. State*, 3 Ohio St. 475; *Williams v. State*, 6 Lea, 549; *Supervisors v. People*, 25 Ill. 183; *Larrison v. Railroad Co.*, 77 Id. 11; *Worthen v. Badgett*, 32 Ark. 496.

It would seem that in this State the practice of this Court has been to look into the legislative journals, and

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to go behind the authentication of the act, to ascertain whether the provisions of the Constitution have been complied with in the procedure to its passage. In *Green v. Graves*, the Court evidently did this, and decided "an act to organize and regulate banking associations" to be unconstitutional, because it did not receive the assent of two-thirds of the members of each house. See 1 Doug. 351.

In *People v. Supervisor*, 16 Mich. 254, the Court examined the journals, and ascertained that the title of the act, as engrossed and signed by the Governor, differed from the title of the bill as passed. CAMPBELL, J., in his opinion, says:

"We have certainly the right to look behind the enrollment of a statute for some purposes, in order to determine whether it passed the Legislature under the conditions required by the Constitution; as, for example, to ascertain what the vote was upon it;" citing *Green v. Graves, supra.*

And in *Attorney General v. Rice*, 64 Mich. 385, this Court again examined the journals. But in none of these cases does it appear that the right to do so was questioned upon the argument. I am of the opinion that the right of the courts to look into the journals for certain purposes, and especially in such cases as *Green v. Graves*, and *People v. Supervisor*, should be sustained, rather than to hold that the enrollment and authentication of the act, as enrolled by the proper officers, is conclusive.

The courts certainly ought to have the right to open the journals of the Legislature to ascertain whether the fraud or mistake of some clerk or employé of the Legislature, or its committees, has not imposed upon the statute-books a different law from the one actually passed by the Legislature, or to determine whether the requisite number of votes have been given under the Constitution to pass a law, when the Constitution requires that the

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ayes and noes shall be entered upon such journals. It must have been intended by the framers of that instrument, by such requirement, that the courts should look into the journals to determine whether the ayes were sufficient to pass a bill in either house as recorded in the journals. How far the journals may be examined, to impeach duly authenticated acts of the Legislature, it is not necessary here to determine. We certainly cannot act upon anything not found in the journals, nor can we presume that any requirement of the Constitution has not been fulfilled, unless the fact appears affirmatively in such journals; and every intendment is to be made in favor of the constitutionality of the passage of the act.

We held in *Attorney General v. Rice, supra,* that, if the object of the act as passed is fully expressed in its title, the form or *status* of such title, at its introduction, or during any of the stages of legislation, before it becomes a law, is immaterial. In the present case, therefore, the act is not unconstitutional, because the title of the bill as introduced differed from the title of the substitute, or the act as passed. The body of this bill, as introduced by Mr. Wellman, does not appear in the house journal, nor does the Constitution require that it should. We have no right to presume that the body of the substitute was not germane to the body of the bill. The title throws some light upon the subject, in both the bill and substitute, and from these titles it would appear that the subject to be legislated upon related to the same matter, to wit, the incorporation of certain territory in the same county of St. Clair into a new political organization or municipality,—the bill, to take territory from the township of Fort Gratiot, in the county of St. Clair, and organizing therefrom a new township, to be called "Huronia;" and the substitute, to incorporate the city of Marine City within the same county. See *Attorney*

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General v. Amos, 60 Mich. 372, 380 (27 N. W. Rep. 571).

We are not informed by the journal what the description of this particular territory was in the body of the bill as introduced, and we cannot go outside of the journals to ascertain it; nor do we consider that it was necessary that the description of the territory in the bill should have been identical with that of the substitute. The lands and property to be affected in both the bill and substitute evidently, from the titles, being in the same county, we are not prepared to say that even the spirit of the constitutional provision was violated. Certainly there is no affirmative showing from the journals that the letter of the constitutional requirement was not observed. The bill was introduced within the 50-day limit. The substitute cannot be considered a "new bill." Article 4, § 28.

As to the reading of the bill and substitute twice by the titles, and only once at length, it cannot be considered, at this late day, a violation of section 19, Art. 4, of the Constitution, which provides that—

"Every bill and joint resolution shall be read three times in each house before the final passage thereof."

The legislative practice of reading the same twice by title, and only once at length, has been maintained too long in this State to be now overthrown by the courts. It would deprive us of all statutory law. The Constitution, in terms, does not direct that the reading shall be at length, and, while such reading might be the better practice, we cannot hold that it is imperatively required that it should be so read more than once. This act, as it passed, was read once in each house at length, as appears from the journals.

The judgment of the court below must be reversed and vacated.

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Judgment will be entered here for the respondents, with costs of both courts against the relator, Frank M. Hart.

SHERWOOD, C. J., CHAMPLIN and CAMPBELL, JJ., concurred. LONG, J., did not sit.

72	454
78	252
72	454
89	535
72	454
105	482
72	454
112	77
72	454
136	1/155
72	454
138	275

JOEL J. PERRIN, ADMINISTRATOR OF THE ESTATE OF HORACE J. PERRIN, DECEASED, v. S. V. R. LEPPER, ADMINISTRATOR, ETC., AND LOUISA FISK, ET AL.

[See 47 Mich. 212; 49 Id. 842, 847; 56 Id. 351.]

Testamentary powers—Wills—Construction—Executors and administrators—Accounting—Death of executor—Liability of representative—Partnership—Surviving partner—Duties of—Death of survivor—Trusts—Rights of beneficiaries—Fraudulent appropriation of trust fund—Laches of beneficiaries—Summary relief—Rights of third persons—Guardian and ward—Agreement between—Fraudulent character of—Equity practice—Reference to commissioner—Appealable orders.

1. A testator, by his last will, gave to his son and only child, a minor, at the age of 21, $3,000, and $1,000 annually thereafter, until 25 years old, when he was to have $10,000 more, if, in the opinion of the executors named, he had used the amounts received in a judicious, frugal manner; and at the age of 35 years, or sooner, if the executors thought best, and upon the same conditions, he was to receive the possession of the balance of his father's estate, both real and personal, not otherwise disposed of under the will; but if at 25, and after the receipt of the $10,000, the son had squandered and wasted what he then had received, and if in the opinion of the executors, he would continue to do so, he then was to receive but the $1,000 annually, and the estate, subject to the other provis-

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ions of the will, was to go to the legal issue of the son, and, if he died without issue, it was then to pass to the testator's legal heirs.

Held, that such will did not convey the estate to the executors named in trust, but only made them executors, with certain additional powers, under which, in certain contingencies, the estate might be made to pass from the son to others after the son had arrived at the age of 35 years.

2. There were five persons named as executors in the will, but one of whom qualified. He was a surviving partner of the intestate, and acted for 15 years as executor, and died without having rendered any account of his trust, and without paying the son anything after he was 24 years of age, who married and died without issue, leaving all his estate to his wife by will. The sole executor never passed upon the son's habits or conduct, and never undertook to exercise the power given to all the executors in that regard.

Held, assuming the power given by the will to be valid, it could not be executed by the sole executor, and after the death of the son could never be executed by any one; that upon the death of the father the title to the real estate vested in the son, and the son became the owner of all testator's personal property, subject to the debts of the estate and the special legacies, and which estate under the son's will, upon his death, passed to his widow, and the heirs of the father had no interest in the estate whatever; that it was not necessary for the son to reduce the estate willed to him to his possession before he could dispose of it, by will, to his wife.

3. *Paper Co. v. Fisk*, 47 Mich. 212, which construes the last will and testament of Joseph Sibley, considered, and followed.

4. An executor's obligation to account in the proper court rests, on his decease, upon his personal representative, who should observe the same rules in so doing as the executor, and should be held to the same strictness, so far as he has knowledge, or with a reasonable degree of diligence can obtain the same.

5. On the death of a surviving partner, who was also executor of the estate of his deceased partner, the representative of the former has no more right to the exclusive control of the copartnership books, papers, and property of the partnership estate than has the representative of the deceased partner.

6. The refusal of the trustee while living, and his representative after his death, to furnish information regarding the condition and management of the estate, and exhibit his account showing the result of the same, and the amount of the estate, after the trust had expired, to those entitled thereto, when properly

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requested, severely criticised and condemned. Fairness between tenants in common, a relation creating the lowest grade of trusts, requires that this should be done.

7. A surviving partner, who is also made executor of the last will and testament of the deceased, and who assumes the guardianship of his only son, takes upon himself the most sacred obligations that can be imposed upon any trustee; and when the authority of a court of equity is properly invoked it will take care that the interests of the beneficiaries are protected, and will exercise great vigilance in scrutinizing the manner in which the trustee has discharged his trust obligations.

8. It is the duty of one assuming to act as guardian of a minor, and the only son of his deceased partner, whose executor he also is, to look after his habits and education, and to secure for him the best advantages for business instruction, and at least to give him such an insight into the estate of his father, and such instruction in relation thereto, as will best qualify him for its successful management.

9. Among the indispensable duties and obligations imposed upon a surviving partner, who is also the executor of the last will and testament of his deceased partner, are the following:

a—To file in the probate court, not only a true and correct inventory of the individual property and assets of the estate, but also of the partnership property; and the latter should show who are the partners, the place where the firm carried on business, and the nature and character of the same, the terms of the copartnership, the capital contributed by each partner, and some statement of the assets and liabilities, so far as he knows them, or can ascertain them with any reasonable certainty.

b—To keep accurate and correct accounts of the estate, and all the assets thereof, showing the accumulations or losses thereon, keeping separate and distinct the individual estate from the partnership interest, and to exhibit such account or accounts whenever called upon to the heir or his attorneys, and to all persons interested in the estate.

c—In the shortest time reasonably consistent with the best interests of the estate, to collect in a sufficient amount of the assets to pay the just debts of the estate, and the specific bequests mentioned in the will; to defend the estate against all unjust claims; to ascertain and collect in all outstanding claims not well secured; and to ascertain and settle the net amount of the assets, and report the same, with a full account of his doings in relation thereto, to the probate court, and obtain its order for such further disposition of the same as may be proper to make.

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d—To work for the best interests of the estate at all times, and so to keep, manage, and invest the property of decedent, that it can be turned over to the persons entitled to it, freed from complications with his own, or the property of others, at the earliest moment consistent with good management.

e—In case of doubt as to the proper construction of the will in regard to final disposition of the estate, to apply to the proper court, and have the matter settled, and take its direction in reference thereto.

10. Where the representative of the surviving partner files a bill offering to account for his intestate's administration of the firm assets, and the account he presents is so imperfect, confused, and manifestly fraudulent as to be an insufficient basis for accounting, and unfit for judicial investigation, and it appears that the surviving partner trafficked with the firm assets, and made large profits therewith, but has destroyed or suppressed the evidence, so that the amount of such profits cannot be ascertained with any degree of certainty, the rules of equity will not require the share of the deceased partner to be ascertained from such fragmentary and imperfect evidence as remains, or as the trustee or his representative sees fit to furnish.

11. In such case, where the share of the deceased partner in the firm at his death is known or can be ascertained with reasonable certainty, the court will apply the well-known rule that a *cestui que trust* may either follow the fund, and take it and the profits, or take the fund, with interest, in lieu of profits, to be computed in such manner and at such rate as will, in view of all the facts and circumstances, be in accordance with the principles of equity and justice. In such case the fraudulent trustee must be held to have elected, in taking the course he did, that this rule might be applied in case equity should be resorted to in the settlement of his accounts, and his estate must abide thereby. But in giving such summary relief the court will not omit to take into consideration the consequences of its decree, and will consider them in connection with the other circumstances in the case, and see to it that an oppressive or unjust result shall not be reached.

12. The precise sum the *cestui que trust* should receive or the trustee should pay is that which the former has lost by the failure of the latter to honestly and properly administer the trust. Where the trustee has misappropriated the funds, or neglected to properly invest them, the *cestui que trust* will be presumed to have lost at least the lawful interest upon the same; and, if the fund has been so used that the accumulations in the hands of the trustee reached beyond interest upon

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the fund, the court will decree to the *cestui que trust* as his loss whatever may have been so received.

13. If a trustee fails or refuses to account, he may be charged with the trust fund, and such accumulations thereon as the best management of the most successful business man would be likely to secure for it. It will be presumed he has received so much or he would have reported his gains. If such gains be greater than compound interest, that may be allowed to the beneficiary; not on the ground that the fund is presumed to have earned a larger sum, but because the court will not allow the trustee to profit by his own wrong, and because as between him and the beneficiary the latter has the better right to the excess.

14. Where a trustee has shown an utter disregard for the interests of the beneficiary, and has deliberately planned to absorb the trust fund by his fraudulent appropriation thereof to his own use, and has attempted to destroy or suppress evidence of his management of the fund, and the profits received therefrom, and has so far succeeded in his purpose that no one but himself can trace the fund or its accumulations, and if, when called upon to account, he refuses so to do, or renders false and fictitious accounts, so defective as to be impossible of proper judicial investigation, in such case, if the amount of the fund which he has used can be ascertained, he may be charged with it, and the largest profits that can lawfully be made thereon by the most sagacious and expert business men, in their management of money, even to the allowing of compound interest at the highest lawful rates, and making rests annually or semi-annually, if it shall appear just and equitable to the court, in order to secure to the *cestui que trust* the profits of his property of which he has been deprived.

15. The law entitles the *cestui que trust* to all the accumulations of his property while in the trustee's hands; and under such circumstances as are mentioned in the preceding paragraph, when the trustee refuses to account, it will be presumed he has received such accumulations so estimated, and that such is the beneficiary's loss, and a court of equity will award it to him. Such an award is not for the purpose of punishing or imposing penalty on the trustee for his maladministration of the trust. Courts of equity do not impose or enforce penalties, or punish parties for their wrongs in the administrations of trusts, but only furnish adequate means of redress; beyond this they do not go, unless so directed by the law-making power.

16. On consideration of the circumstances of this case, it is found

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that no laches are imputable to the representatives of the deceased partner in pressing their claims for an accounting against the surviving partner.

17. A surviving partner, who was also executor of the deceased partner, was guilty of gross fraud in the administration of his trust. He filed a false inventory in the probate court. He converted the entire assets of the firm, and most of the individual estate of the decedent, to his own use, and covered up his fraud by false entries in books, and by suppression and destruction of books, papers, and documents. He trafficked with the assets, and made large profits, though, on account of his manipulations of the books, the exact amount thereof cannot be ascertained. When the heir filed a bill against him for an accounting, he answered with a false and fraudulent statement, showing that nothing was due, and after the death of the heir substantially repeated these statements in his answer to a bill brought by the heir's widow and sole devisee. He persistently evaded and resisted judicial investigation in the probate court, and elsewhere, and died 15 years after his partner, in 1880, without having accounted. His administrator, after resisting for years all attempts to get at the true state of the firm's books in the probate court, filed a bill offering to account with the representatives of the deceased partner, but attached no account of his intestate's administration. A demurrer to his bill on this ground having been sustained by this Court, he presented accounts which are found to be false and fraudulent, and insufficient to be made the basis of an accounting, and unfit for judicial investigation.

Held, that no further accounting is necessary, and that the representatives of the deceased partner, after a contest of 24 years for their rights, are entitled to summary relief; and, it appearing that the interest of the latter in the firm at his death, in 1864, was at least $104,000, a decree is granted for that sum, with interest at 10 per cent. to the time of the trustee's death, in 1880, amounting to $262,715.55, and to this amount interest is added at 7 per cent. to the date of the decree, November 28, 1888, the whole amounting to $426,029.66, together with costs of both courts, and a counsel fee of $20,000.

18. In this case a relative of the fraudulent trustee, and who was made a party, claimed to have been a partner, and asked for an accounting. But it appeared that he contributed no capital to the firm, and that he was cognizant of and participated in most of the fraudulent devices by which the representatives of the deceased partner were sought to be defrauded.

Held, that the latter are not to be embarrassed by the vexa-

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tion, expense, and delay in the determination of his rights, if any; that their claim is to be first paid, and the bill may be retained for such further proceedings as are necessary to adjudicate his claim, if he desires so to do, against the trustee's estate.

19. A surviving partner, who was executor of the deceased partner, was also tenant in common with him of certain mill property, and he assumed to be guardian of the decedent's only son. On the day the latter became of age, or about that time, the surviving partner entered into agreements with the heir, who was without any experience in the management of property, authorizing the former to make certain improvements on the tenant in common property, and to charge therefor certain gross sums mentioned therein. Other agreements of like nature were made shortly after. These all assumed that the interest of the deceased in the firm was worthless, and amounted to an assignment by the heir to the surviving partner of the rents and profits in consideration of making advances. In reality the firm had a large surplus, in which the interest of the deceased partner was over $100,000.

Held, that the agreements were fraudulent, and not binding upon the heir.

20. The testimony in this case was taken under an order directing proofs to be taken "relating to matters in controversy between the parties necessary or proper to be determined for the purpose of ascertaining and determining the principles upon which the accountings in this case, or any of them, should proceed." This order was liberally construed by all parties. Complainant, the representative of the surviving partner, undertook to state an account, and gave testimony on every item therein. Nearly 10,000 pages of testimony were taken, and it appeared that all the information that was obtainable was thus brought before the court.

Held, that notwithstanding the technical form of the order of reference, a final decree would be rendered, if in so doing justice between the parties could be attained.

21. A surviving partner was also executor of the last will and testament of the deceased, and tenant in common with his heir of certain mill property. After his death his administrator filed a bill offering to account with the representatives of the deceased partner as to the administration of the surviving partner in his capacity as such, and also as executor and tenant in common. There were controversies as to who were entitled to participate in the accounting on behalf of the deceased partner, as to who composed the firm, as to the genuineness of certain articles alleged to be in renewal of the

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partnership, as to the legality of certain agreements made with the heir with reference to improvements on the tenant in common property, as to the *bona fides* and sufficiency of accounts attached to the bill, and as to the form of relief; the complainant claiming the right to account from such books and papers as remain on hand, and defendants claiming, on account of the trustee's fraud, summary relief, and a return of the deceased partner's capital, with compound interest. The court below made a decree fixing the principles of the accounting, in which all of those controversies were passed upon and decided.

Held, that such a decree was final and appealable; that it was a determination of substantial rights; and, under the practice in this State, the party whose rights are thus determined is entitled to a review in this Court of the proceedings by which it has been done. It is the effect, and not the form, of the order or decree, or the particular classification of the same, which determines the right to appeal.[1]

Appeal from Calhoun. (Hooker, J.) Argued February 28 and 29, and March 1 and 2, 1888. Decided November 28, 1888.

Bill filed for an accounting, etc. Complainant, and all the defendants except the Perrins appeal. Decree entered in this Court in accordance with opinion, in which the facts are stated.

M. J. Smiley (*J. A. Stull* and *Ashley Pond*, of counsel), for complainant, contended:

1. Compound interest will not be decreed as a punishment for misconduct, but only upon the theory and because it appears that the trustee has realized as much as compound interest amounts to, or that he ought to have received that much, or that the circumstances are such that he is estopped from saying that he did not receive that much; citing *Attorney General v. Alford*, DeGex, M. & G. 851.
2. It appears from a view of all the authorities that a distinction has been taken, as in every moral point of view there ought to be, between negligence and corruption in an executor. If he has balances which he ought to have laid out, either in

[1] Head-notes prepared by SHERWOOD, C. J.

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compliance with the express directions of the will, or from his general duty even where the will is silent, yet if there be nothing more proved, in either case the omission to lay out money amounts to a case of negligence or of misfeasance; citing *Tebbs v. Carpenter*, 1 Madd. 162, and cases cited and reviewed by the vice-chancellor in that case.

8. As illustrating the American rule on this subject, counsel cited *Schieffelin v. Stewart*, 1 Johns. Ch. 610; *Manning v. Manning*, Id. 528; *Bryant v. Craig*, 12 Ala. 354; Perry, Trusts, §§ 468, 470; *Ins. Co. v. Lynch*, 11 Paige, 523; *Hazard v. Durant*, 14 R. I. 25; *Ames v. Scudder*, 11 Mo. App. 168; *Cruce v. Cruce*, 81 Mo. 676; *Hollister v. Bradley*, 11 N. H. 511; *Clarkson v. DePeyster*, Hopk. Ch. 424.

4. Can a court of equity in Michigan allow a sum for interest greater than the limit of the legal rate? Is it within its power, and if so can it be allowed except where the profits have been that much or more, and are proven to be so much? We submit that the court has no such jurisdiction.

5. When an election is allowed between profits and interest, the *cestui que trust* must take one or the other for the whole period and upon the whole capital; citing Hill, Trusts, 374; *Heathcote v. Hulme*, 1 Jac. & W. 122; Perry, Trusts, § 470; Lindley, Part. 1113

6. The trustee is entitled to commissions. As a general rule, and in the case of executors, their commissions being statutory, they are entitled to them as a matter of right, even in cases of misconduct in the management of their trusts, and even in cases where they have been charged compound interest; citing *King v. Talbot*, 40 N. Y. 96; *Vanderheyden v. Vanderheyden*, 2 Paige, 288; *Meacham v. Sternes*, 9 Id. 405; *Rapalge v. Norsworthy's Ex'rs*, 1 Sandf. Ch. 406; *Iddings v. Bruen*, 4 Id. 239, 268; *McWhorter v. Benson*, Hopk. Ch. 28.

7. So, in cases where profits are allowed, in taking the account the trustee or surviving partner by whose exertions they have been made is generally allowed compensation for his services; citing Lindley, Part. 984.

Charles M. Swift (with *Samuel T. Douglas* and *Wm. H. Porter*), for defendants Lepper and Fisk, contended, on the question of compound interest, as follows:

1. The Michigan cases establish two propositions:

a—That compound interest is not allowed for mere neglect to invest, or for the intermingling of the trust fund with the private funds of the trustee where there has been no fraud

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or overreaching, and where the fund has earned simple interest or less.

b—That where the trustee has been guilty of fraud, and where he has destroyed or concealed evidence, and where there is reason to believe that large profits have been earned, all presumptions will be against the trustee; profits will be fixed at a percentage or ratio which appears to be equitable according to the best lights the court can get, and compound interest will be allowed.

Compare *Moyer v. Fletcher*, 56 Mich. 508, and *Gott v. Culp*, 45 Id. 265, with *Heath v. Waters*, 40 Id. 457.

2. As showing the rule as stated by text-writers, counsel cited 2 Kent, Com. 231 (note); 2 Story, Eq. Jur. § 1277; Perry, Trusts, § 468, 471; 2 Pom. Eq. § 1075 (note), 1076.

3. As showing the English rule, counsel cited the following cases: *Raphael v. Boehm*, 11 Ves. 92; 13 Id. 407, 590; *Walker v. Woodward*, 1 Russ. 107; *Walrond v. Walrond*, 29 Beav. 536; *Jones v. Foxall*, 15 Id. 388; *Williams v. Powell*, Id. 461; *Saltmarsh v. Barrett*, 31 Beav. 349, 350; *Knott v. Cotte*, 16 Id. 77; *Ex parte Baker*, 18 Ves. 246.

4. The following American cases were cited: *Schieffelin v. Stewart*, 1 Johns. Ch. 620; *Diffenderffer v. Winder*, 3 Gill & J. (Md.) 311; *McKnight's Ex'rs v. Walsh*, 23 N. J. Eq. 136: *King v. Talbot*, 40 N. Y. 76; *Adair v. Brimmer*, 74 Id. 539; *Bowles v. Drayton*, 1 Desaus. Eq. (S. C.) 489: *Walker v. Walker*, 9 Wall. 743; *Price v. Peterson*, 38 Ark. 494; *Eliott v. Sparrell*, 114 Mass. 404; *Jennison v. Hapgood*, 10 Pick. 77; *Ogden v. Larrabee*, 57 Ill. 389; *Moore's Ex'rs v. Beauchamp*, 5 Dana (Ky.), 70; *Berwick v. Halsey*, 4 Redfield (N. Y.), 18; *Lathrop v. Smalley's Ex'rs*, 23 N. J. Eq. 192; *Hook v. Payne*, 14 Wall. 252; *Gully v. Dunlap*, 24 Miss. 410; *Edmonds v. Crenshaw*, Harp. Eq. (S. C.) 224.

[The briefs in this case contain nearly 1,000 pages, and are, in the main, confined to a review of the facts as claimed by the respective parties, and of many of the cases cited, with quotations therefrom.—REPORTER.]

Wm. D. Adams (*John J. Speed,* of counsel), for Perrin defendants.

Miner & Stace (*Geo. H. Southworth,* of counsel), for defendants "The Sibley Heirs."

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SHERWOOD, C. J. Joseph Sibley, on October 11, 1858, resided in the city of Marshall. He was a physician, and practiced his profession, and for the previous 18 years was also engaged in loaning money, buying notes and mortgages, and other securities. His principal business was, however, at the time referred to, loaning money upon bonds and mortgages, and it is claimed by the defendants that he was then worth at least $200,000. They further claim that he had but little knowledge of book-keeping, and less capacity still for understanding double entry.

At the date first mentioned he formed a copartnership with Horace J. Perrin, who then resided in the city of Marshall, where he had for 11 years previous carried on business, and at the time of the formation of the partnership was engaged in loaning money, dealing in lands, and carrying on a milling business, and at that time, it is claimed by complainant he was worth about $200,000.

Dr. Sibley was married, had one son, his only child, whose name was Francis M. Sibley. Horace J. Perrin was a single man, and never married.

A short time previous to the formation of the copartnership with Dr. Sibley, Horace J. Perrin had been engaged in the banking business in New York, with a Mr. Gilbert, but with what success does not very clearly appear. He had also had considerable dealings with his uncle, Darius Perrin, a banker of the city of Rochester, N. Y., who was then favorably and extensively known as a capitalist of large business experience. When the partnership was formed, Sibley put into the firm as capital about the sum of $104,000 in securities, consisting mainly of good bonds and mortgages. Just what amount of capital H. J. Perrin put into the firm it is very difficult to ascertain. Complainant claims, however, a sum amounting at least to $123,000.

The articles of copartnership read as follows:

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"Articles of copartnership made and entered into October 11, A. D. 1858, between Joseph Sibley of the first part and Horace J. Perrin of the second part, witnesseth:

"*First.* That the said parties hereby agree to enter into copartnership with each other for the purpose of carrying on the business of banking, and such other business as relates to the purchase and sale of exchange, buying, discounting, and advancing, upon paper or other securities, issuing certificates of deposit, and doing a general milling business, so far as the same can be done in running the custom mill on lot No. 4, in Marshall, which is hereby leased to said firm by the party of the second part, for and during the continuance of this copartnership, at an annual rent of two thousand dollars ($2,000) per year, paying quarterly, and the taxes on the same. The style or name of said firm shall be H. J. Perrin & Co., and the place of business, Marshall, Mich.

"*Second.* The said copartnership shall commence October 11, and continue for the space of three years, unless sooner dissolved by the death of one of the parties.

"*Third.* The capital to be invested as joint stock in the business shall be ——— dollars, of which the said Sibley, party of the first part, shall contribute and pay in, by transfer to the firm, in bonds and mortgages, notes and moneys, the sum of one hundred and three thousand eight hundred and six dollars and thirty-nine cents; and the said Perrin, party of the second part, shall in like manner pay in, by transfer of bonds and mortgages, notes and moneys, the sum of ———; each party to be credited and allowed annually, on the books of the company, such a rate of interest as such bonds and mortgages shall pay so transferred by him; and each for himself guarantying to the other, and to said firm, that the makers of each bond and mortgage, note, or other security so transferred by them to said company, shall pay as the same becomes due and payable, according to the terms of said papers, together with all costs of collection, including attorney's fee; but on any moneys not so invested, which shall be paid into said firm by either of us, the rate of interest shall be seven per cent. only per annum, and at the time of the dissolution of this copartnership he will receive back from said firm, as so much of his portion of the assets, any portion of such secureties so transferred by him as shall then remain unpaid.

"*Fourth.* The profits and losses of the company shall be shared and equally divided between the parties.

"*Fifth.* The said parties shall each give their time, and exert their skill and energies, to and for the best interests of the firm, so far as may be needful for the prosperity and success of the company's business.

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"*Sixth.* The name of this firm shall not be used by either of said parties without the written consent of the other, as indorser or security for others.

"*Seventh.* Neither party shall draw from the funds of the same a greater sum than one thousand dollars per year, on which he shall be charged seven per cent. per annum.

"*Eighth.* In case Darius Perrin, of Rochester, N. Y., shall consent to the use of his name as a joint partner with us under the articles of copartnership, sharing profits and losses equally with us, he is at liberty to do so at any time, in giving us notice in writing, and consenting to the use of his name

"*Ninth.* In case of the termination of this copartnership by the death of either party, the business of the firm shall be wound up and closed by the survivors as soon as may be, with reasonable and proper regard to the interest, and a true account rendered, and a settlement be made by the survivors as soon as practicable, with the legal representatives of the deceased.

"*Tenth.* Regular and accurate books of account shall be kept of all the transactions of the firm, to which both parties shall have free access.

"*Eleventh.* On the 1st day of January, April, July, and October of each year an account of stock shall be taken, and a balance shall be made showing the profits or losses for the past quarter.

"DARIUS PERRIN.
"H. J. PERRIN.
"J. SIBLEY."

The firm commenced business at once on the formation of the copartnership, and continued the same until the 30th day of April, 1859, when it is claimed by the complainant that Darius Perrin became a member of the firm of H. J. Perrin & Co., in pursuance of the eighth clause of the articles of copartnership; and that thereupon Horace J. Perrin and Joseph Sibley made the following instrument as evidence of such fact, viz.:

"Darius Perrin, of the city of Rochester, N. Y., having elected to become a copartner with Joseph Sibley and Horace J. Perrin, in pursuance of article 8 of the annexed articles of copartnership, now it is agreed that said Darius Perrin shall become such partner from and after the day of the date hereof, and that henceforward the name of said Darius Perrin may be used as a mem-

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ber of said copartnership, and he shall from and after this time share in the profits and losses of the copartnership business as provided by said eighth article.

"H. J. PERRIN.
"J. SIBLEY.

"*Dated April* 30, 1859."

This instrument appears attached to the articles of copartnership. It is conceded that Darius never put into said firm any capital whatever, and then, and ever since has, resided in the state of New York, at the city of Rochester. The defendants Lepper and Fisk deny that Darius Perrin was ever such partner as is claimed by complainant, and defendants the Sibley heirs also make the same denial. Darius Perrin admits and claims he was a partner, but Elizabeth and Caroline, his daughters, are silent upon the subject in their answers. Defendants Lepper and Fisk also deny the genuineness of the instrument admitting Darius into the firm, a copy of which appears above.

The partnership between Joseph Sibley and Horace J. Perrin continued until Sibley died, on September 7, 1864, and all the time did a large amount of business. By the terms of copartnership it would have expired on October 11, 1861. The term of its continuance was extended by Horace J. Perrin and Joseph Sibley for three years from the time of its expiration mentioned in the articles of copartnership. This extension was in writing, and was made July 31, 1861. The writing is claimed by complainant to be as follows:

"We hereby renew the articles of agreement or copartnership and company papers, and extend the term of our regular business, or articles of agreement, or copartnership, for three years from the time the same would expire, in 1861, on precisely the same terms. [All interest on each's capital and paper to be seven per cent. from 1858.]

H. J. PERRIN.
"*July* 31, 1861. J. SIBLEY."

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Defendants Lepper and Fisk admit that the firm was continued until Dr. Sibley died, but claim that the agreement under which the extension was made did not contain the clause quoted in brackets, and that said clause was fraudulently inserted at the end of said written extension by Horace J. Perrin after the same was made and signed.

The Sibley heirs say that they admit the copartnership existed, at the time Sibley died, between Horace J. Perrin and Joseph Sibley, but say nothing of the manner of its continuance.

Darius Perrin admits that the copartnership was extended three years by an instrument in writing, signed by Horace J. Perrin and Joseph Sibley, but denies upon his information and belief that such extension was by the above written agreement set forth, and says that the terms were in all respects precisely the same as those contained in the original articles of copartnership.

Before Joseph Sibley died he made a last will, and attached a codicil thereto. These instruments, or rather copies thereof, read as follows:

"KNOW ALL MEN BY THESE PRESENTS that I, Joseph Sibley, of the city of Marshall, county of Calhoun, and State of Michigan, being of sound mind and memory, do make, publish, and declare the following to be my last will and testament:

"*Firstly.* I will that all my just debts and funeral expenses be paid.

"*Secondly.* I give and bequeath to my beloved wife, Hannah, all my household goods and furniture, all my stock, farming tools, wagons, etc., and the use during her life-time of all the land, buildings, and tenements I own, at my decease, on section No. twenty-six (26), within the said city of Marshall; and also $20,000 at once, or $1,000 annually, at her election, during her life-time, to be paid out of my estate.

"*Thirdly.* I will, if it is not done during my life-time, that lot No. 207, group F, I own in the said city of Marshall cemetery, be inclosed with a suitable iron fence, and a suitable family monument erected therein, under the direction of my beloved wife,

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should she be living, and, if not, under the direction of my beloved son, Frank.

"*Fourth.* I give and bequeath to my beloved son, Francis M. Sibley, when he arrives at the age of twenty-one years, $3,000, and $1,000 annually thereafter, until he arrives at the age of twenty-five years; and if at that time he shall have used what he has received, as above stated, in a judicious, frugal manner, and not wasted and squandered it (in the opinion of my executors hereunto appointed), he shall then receive $10,000 more; and if, at the age of thirty years, or sooner, if in the opinion of my said executors he shall have managed, and will continue to do so, what he has already received, in a judicious, frugal manner, he shall receive $15,000 more; and if, at the age of thirty-five years, or sooner, if in the opinion of said executors he shall have, and will still continue to use what he has received, as before stated, in a frugal, economical, and judicious manner, he shall come into full possession of all my estate, personal and real, not otherwise disposed of by this will, or otherwise.

"But if, after having received $10,000 at the age of twenty-five years, he shall have squandered and wasted what he has already received, or in the opinion of said executors he will waste and squander what he receives, he shall thereafter receive but $1,000 annually, and all my estate, real and personal, not otherwise disposed of, shall go to the legal issue or children of my beloved son, Francis M. Sibley; but, in case he dies without said issue or children, then, in that case, it shall go to my legal heirs and representatives equally, according to law, except my beloved sister Roxana Collins, and her heirs, who shall receive only five dollars.

"*Lastly.* I give and bequeath to my beloved nephew James R. Sibley all the land I own in Fredonia, Calhoun county, Michigan, being the west fractional one-half of section number two (2), in said town of Fredonia, he, the said James R. Sibley, to pay to my estate for all stock and tools, and all other personal property that I have put on to said land, as per my books, at the end of ten years, with interest thereon annually.

"And I hereby appoint Manlius Mann, Horace J. Perrin, William Powell, Charles P. Dibble, and Joseph C. Frink as executors to carry out the foregoing will; and they are to have the control and direction of my beloved son, Frank, during his minority, and the above-named executors, a majority of them, are authorized to choose their own successors in office. J. SIBLEY. [L. S.]

"Signed and sealed in the presence of

"WILLIAM POWELL.

"C. H. MANN.

"HARRIET M. MANN.

"E. CHURCH.

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"MARSHALL, September 3, A. D. 1864.

"In addition to the foregoing will, I hereby give and bequeath to my beloved friend Wm. Powell, of Marshall, Calhoun county, Michigan, the sum of $1,000, compensation for looking after and assisting my family and their interest when I am gone, and I hereby declare this and foregoing to be my entire last will and testament. JOSEPH SIBLEY. [L. S.]

"Signed and sealed in the presence of

"MANLIUS MANN.

"WM. H. HOLMES.

"KITTIE E. MANN."

The date of the codicil appears to have been on the 3d day of September, 1864, but four days before the testator's death. There is nothing upon the other portions of the will showing its date, or when it was made and executed.

By the death of Sibley the copartnership was dissolved. During its existence, Sibley had unlimited confidence in the business ability and judgment of his partner, Horace J. Perrin, and he had but little to do with the management of the business of the firm. He trusted its management almost exclusively to Mr. Perrin. The firm had done during its existence a large amount of business of various kinds. Its ordinary or principal business was banking and loaning money on bonds and mortgages. It carried on its banking in Michigan, Illinois, and Wisconsin, and was the owner of six different banks, and a portion of the time had a branch office in the city of Chicago. It dealt largely in wheat and flour, and part of the time operated a large flouring-mill, besides a custom-mill, at Marshall, and carried on a feed-store in connection with the milling business. It was engaged in buying and selling real estate; dealt in stocks and state bonds; ran a paper-mill; carried on some farming operations; and dealt considerably in wool and western money. After the death of Joseph Sibley, and the dissolution of the firm of H. J. Perrin & Co., H. J. Perrin continued

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the business in which the firm had been engaged until he died, on the 11th day of January, 1880.

All the executors of the will appointed by Joseph Sibley declined to act as such, or in any manner discharge the trusts created by the will, except Horace J. Perrin, who, after the will had been duly probated, on the 7th day of October, 1864, accepted the trust, and he alone was duly appointed executor by the judge of probate of Calhoun county. At this time Francis M. Sibley, the only heir of Joseph Sibley, was but 19 years and 2 months old, and his mother, the widow of Joseph Sibley, was still living. It is stated in the record by both Horace and Darius Perrin that at the time of the decease of Joseph Sibley, and for six years previous thereto, Horace Perrin had been an intimate friend of Joseph Sibley, who "had the most implicit trust, reliance, and confidence in Horace J. Perrin," and that Joseph Sibley at that time—

"Had no confidence whatever in the integrity or discretion of his said son, Francis M. Sibley, but, on the contrary, well knew he was addicted to habits of extravagance, profligacy, and prodigality;"—

That he was a wild youth, of "spendthrift, profligate, prodigal, idle habits;" and his father frequently said that his son gave him the "greatest anxiety" on account of his habits, and in consequence of which he feared—

"And was apprehensive that he would waste and expend the whole of his patrimony as soon as the same should come into his hands."

As surviving partner, Horace J. Perrin had possession of all the property and assets of the firm of H. J. Perrin & Co., and all of the estate of Joseph Sibley, as executor of his will, after his appointment, and ever after, so long as he lived, managed and controlled and disposed of the same, whether such estate was individual, copartnership,

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or tenant in common property. On the 21st day of January, 1865, he claimed to have made and filed an inventory of the Sibley estate, and appraisal thereof, from which it appears that the individual and tenant in common property belonging to the estate amounted to the sum of $67,592.04; and that the interest of the estate in the firm property of Horace J. Perrin & Co. was the sum of $10,533.81. Also, in connection with this inventory, the statement is made by Horace J. Perrin that nothing had been allowed for profits or losses in the business of the firm, but the losses, being over $75,000, would probably cover all profits of company business, with extraordinary success in collecting the old paper put in by Sibley as capital.

In the month of May, 1865, the commissioners upon the estate of Joseph Sibley made their report on claims, from which it appears they allowed against the estate, as indebtedness due from Sibley individually, $954.71, and claims against H. J. Perrin and J. Sibley and H. J. Perrin & Co. the sum of $110,679.33 against the estate. H. J. Perrin had charge of the business of the firm, controlled its business, and the conduct of the same, during the existence of the copartnership, and had two or three different clerks to assist him, but all were under his direction and dictation. He drafted very many of the business papers himself, and was regarded by those who knew him best as a sharp, selfish, grasping man, of a very high order of business ability, which was well developed in looking after his own interests. He was not exceedingly communicative about his business, but was remarkably discreet in making the most of opportunities when presented; and while he left the details of his transactions to his clerks, as directed by him, the business was always done by himself, and in such manner as to be little understood by others. His modes were not those of business

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men generally, and while they may have been to him simple, and easily explained by him, they are shown to be by others almost past finding out. He had a way of placing the title to a large amount of his own and the firm property in relatives and friends, both in and out of the State, and of taking title to the property of others and of the firm to himself, and making no explanation of the transaction to those whose interest might be affected thereby, which can hardly be recognized, from what is known of these transactions, as fair dealings. He took upon himself trust relations, from the responsibilities of which others shrank, without any apparent conception of the duties they imposed upon him, or any recognition of many of the rights of his *cestuis que trust*.

"No regular or separate partnership books were kept" for the accounts of the firm, but the accounts were kept upon whatever books happened to be at hand, and the firm and individual accounts were mingled on the same set of books in such a manner as to lead to the greatest confusion and difficulty in understanding them. Indeed, no man has yet appeared who has been able to give a satisfactory explanation of them, not even the clerks who assisted in making them. No inventory or account of stock of the firm was taken at the time before the death of Joseph Sibley, and no inventory of the firm's property was ever made by Horace J. Perrin after Sibley's death.

Joseph Sibley was sick for more than a year, and was confined to his bed for six weeks previous to his death. He left a widow without business experience, who elected to take the money provision made for her in her husband's will. His son was a minor, of wild, dissolute habits, without business experience or business capacity, and it would appear that his father had but little expectation he ever would have. The men under whose protection this father, upon his dying-bed, had placed his

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son by his will, had declined that charge, and he was left without the guardianship of any one whose special care and duty it was to look after him, or his estate, during his minority. It is true, Horace J. Perrin had qualified as sole executor of his father's estate. This, however, he should not have done. The position was incompatible with his relation to the estate of Joseph Sibley as surviving partner, and it is hardly to be presumed the testator would have thought to have conferred on Perrin alone the important trust relating to his son, Francis, contained in the will, and which certainly vested in him none of the important discretionary powers, concerning the young man and his estate, which could only be exercised by all the persons appointed by the deceased to execute his will, or a majority of them.

During his minority, Francis was attending school at Rochester, and for a time was in Perrin's office, at Albany, where it is said he acted badly, and where he continued until he was of age. During his minority H. J. Perrin paid the specific legacies mentioned in the will and codicil, and made improvements on the tenant in common property, for which he claimed a liability against the Sibley estate to the amount of about $40,000. The entire estate of Joseph Sibley was at this time, of whatever character or kind, whether individual, tenant in common, or copartnership, with all the books, title deeds, and papers relating thereto, either in the possession of, or under the control of, H. J. Perrin, as surviving partner, executor, or trustee, and he claimed the right, under the discretionary power given in the will to all the persons named therein as executors, to dispose of the same, and judge of the qualifications, habits, and prospects of young Francis, and to determine the amount of the estate, if any, that should be paid to him accordingly, from time to time, thereafter.

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This was about the situation of Francis and his inheritance at the time he became of age, on August 28, 1866. Knowing the friendship and great confidence and respect Joseph Sibley had for the business character and ability of Perrin, and the assurance his father had given him of this in the provisions he had made in his will, he undoubtedly became impressed with the same views on arriving at age, and was ready to adopt any business arrangements and schemes suggested by Perrin, and accommodate himself to any action Perrin might desire him to take relating to the property of the estate and its management; and before he left Albany, and, as the defendant Mrs. Fisk now claims, the next day after he became of age, but as complainant claims, about 14 days thereafter, he was visited by Mr. Perrin, who procured his signature to certain papers, reading as follows:

No. 1. "WHEREAS, My father, Joseph Sibley, late of the city of Marshall, Mich., deceased, died leaving a large amount of real estate in said city and vicinity, owned by him in common with, or as partner of, Horace J. Perrin, and Horace J. Perrin and Darius Perrin, which said property constituted his entire property, and more than his entire property after paying the legacies to my mother, James R. Sibley, and others; and

"WHEREAS, My said father left a will appointing said Horace J. Perrin and others executors thereof, and the said Horace J. Perrin has become sole executor of such will; and

"WHEREAS, A large portion of said real estate was at the time of the death of my said father, and some of it is still, comparatively unproductive, and the said Horace J. Perrin has at my request and urgent desire furnished and advanced means from his own resources, and has made certain improvements, and it is desirable that other and further improvements be made on said property so as to make it more productive, some of which said improvements made and contemplated are as follows, and for which the said Horace Perrin is to be paid, from the first moneys coming into his hands as such executor or joint tenant, and from the avails of any property of said estate, the following sums, to wit:

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"That is to say, for furnishing materials and building dam across the Kalamazoo river, and building embankment on south side of same, the sum of $23,800; for building embankment on north side of river, and between race and river, the sum of $3,500; for building planing-mill, water-wheel, and shafting, $6,964; for building plaster-mill, building and putting in machinery in same, $6,884.96; for building floor to paper-mill, new foundation wall, water-wheel, and machinery now being put in, $9,600.

"And I also request the said Horace J. Perrin to go on and complete the Marshall House, and finish the same suitable for a female seminary building, as contemplated should be done by my said father, and to keep an account of the same, which shall be paid as aforsaid with the other said improvements; that is to say, the one-half of said expenses of so rebuilding and improving the same, although all of said improvements are being made at a time when the currency of the country is much below par, and labor and material more than double the price ever ruling before in this country, yet to keep the property in a paying manner, or to command tenants at all, I consider it important it should be done and completed at as early a day as practicable:

"Now, therefore, in consideration of the premises, I hereby ratify and confirm all the acts and doings of the said Horace J. Perrin in the premises, and in the making of said improvements as aforesaid, and in the making of such improvements on, or as has been made on, any of the real estate so owned as aforesaid; and I hereby consent and request the said Horace J. Perrin to go on and make such other improvements on any of said real estate as he shall deem advantageous to the owners thereof, and that he take out of, or charge to, the estate of my father the due proportion thereof,—that is, of the expenses of any and all such improvements so made, or to be made,—which said sum shall be paid to him, with annual interest, and he shall retain possession of said lands and property till paid for such expenditures.

In witness whereof I have hereunto set my hand and seal this 29th day of August, September 14th, in the year of our Lord one thousand eight hundred and sixty-six.

"D. E. AIKIN. F. M. SIBLEY.

"W. H. PARDEE.

"Alteration of date done before signing."

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No. 2 is as follows:

"I agree to go on and make and finish the improvements on the property as mentioned in the within or annexed paper between me and F. M. Sibley, and I hereby assign, transfer, and set over to Darius Perrin the leases of, and use and possession of, all said property mentioned in said paper so executed between me and the said Sibley, dated Sept. 14, 1866, till the receipt from which property shall pay the said Darius the sum of $31,000, or until the said sum is paid, and interest from this date, and all taxes assessed on said property from this date.

"*September* 14, 1866. H. J. PERRIN.
"F. M. SIBLEY."

No. 3 reads:

"For a valuable consideration, I, F. M. Sibley, do hereby join in and consent to the above assignment and disposition of the within-described property.

"*Dated September* 14, 1866. F. M. SIBLEY."

This paper was annexed to the other.

No. 4 is without date, and says:

"H. J. PERRIN:

"In addition to putting in bolts in custom-mill on lot 4, Marshall, which said last-mentioned repairs have cost $2,550 (twenty-five hundred and fifty dollars), you may and are hereby requested to put in smutter and buckwheat bolt, to cost not exceeding seven hundred and fifty ($750) dollars, one-half of which you may charge estate of Joseph Sibley, deceased. F. M. SIBLEY."

No. 5 relates to rebuilding the company's flouring-mill on the tenant in common property, and is in the following language:

"JANUARY 30, 1867.

"I hereby authorize and request H. J. Perrin to rebuild the stone mill on lot one, in the city of Marshall; that is, the upright part, leaving off the office and feed-room (said mill was burned on the morning of the 14th instant), at a cost of thirty-six thousand dollars ($36,000). He, the said Perrin, to use insurance on old mill first, and, for the balance of my own (½) half of the expense of

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rebuilding said mill, I authorize him to use any money and means belonging to the estate of Joseph Sibley, deceased, that may be in his hands from the effects of said estate. F. M. SIBLEY.

"In pursuance of the above, I agree to rebuild the upright part of said mill for the sum of $36,000; that is, the walls to be used as they stand, and I am to have all the old material. H. J. PERRIN.

"F. M. SIBLEY."

It is claimed by defendants this sum was much more than the work cost Perrin, and more than it was worth.

No. 6, and last, of these papers, to which the young man's signature was obtained by Perrin, is as follows:

"The price of building the stone mill office of stone is agreed on at $1,196.34. The price of building wheat-house at stone mill is $2,396.78, one-half of which is to be charged by said Perrin to the J. Sibley estate, and paid out of the first moneys received from said estate to the said H. J. Perrin. F. M. SIBLEY.

"*Marshall, July* 27, '67."

These several agreements, it will be noticed, obtained from Francis by Perrin, disposed of about $40,000 of his father's estate in making improvements upon the tenant in common property, at the instance of Mr. Perrin, during the first year after the young man became of age, and without his yet really knowing in what the estate consisted, its situation or extent, and which was, in less than five years thereafter, completely destroyed by fire. At this time H. J. Perrin had not yet paid Francis the first installment of his legacy, which he should have received when he became of age. He was informed by Perrin that the exact affairs of the firm of H. J. Perrin & Co. could not be ascertained, but that the estate of Joseph Sibley was largely indebted to him, and when he died said estate did not exceed the sum of $75,000, and that was subject to large incumbrances, and that the firm of H. J. Perrin & Co. did not owe the estate of Joseph Sibley anything.

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Francis, being unable, as he claimed, to obtain any accounting of his father's estate by Perrin, or of the state of the firm matters, or get access to the books and papers relating thereto, or money from said Perrin, on September 4, 1868, filed his bill of complaint in the circuit court for the county of Calhoun, in chancery, against the said Horace J. Perrin and Darius Perrin, for discovery of the true relation Darius Perrin sustained to the firm business of H. J. Perrin & Co., the character of that business, and where and to what extent it was carried on; the losses and profits thereof; what amount of property the firm owned, and in what it consisted, and where situated, at the time of the death of Joseph Sibley, and what amount belonged to him, and what was afterwards done with the same; and prayed that H. J. Perrin might set forth a true statement of all the property of the firm, and its income since the death of Joseph Sibley, and make a true statement of the individual estate of Joseph Sibley, and his doings therewith, and management thereof, as executor of the will of Joseph Sibley, and come to a correct and proper accounting with him, said Francis, for the estate and proceeds thereof left to him by his father, and that he might be placed in possession thereof.

The bill also alleged, after stating the death of Joseph Sibley, and the acceptance of the executorship of the estate by Horace J. Perrin, and that he was in possession thereof, as executor, tenant in common, or surviving partner, that Joseph Sibley's estate was at the time of his death of the value of $250,000, and that said Horace J. Perrin had neglected and refused to render a true, just, and full statement of the affairs and condition of the property of said firm to him, or to give him any information satisfactory on the subject; that Perrin had all the books and papers relating to the firm's business in his possession, and refused to let him see them, or have

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access thereto, or any person in his behalf: that he did not believe he intended to render a just and true account of the business of said firm, or disclose what sum was due to the estate, but designed, with the co-operation of Darius, to retain said estate to his own use, and appropriate the same, and defraud Francis out of his inheritance left to him by his father; that he was then using for his own individual gain the property belonging to the estate.

The bill further avers that all debts due and owing by the estate had been paid, and all special legacies except his own, and that he was informed and believed he was then entitled to receive and come into possession of the balance of the estate of Joseph Sibley, deceased, and that the property involved in the litigation was $75,000.

H. J. Perrin, in his answer, among other things, averred that he could not tell the exact condition of the firm property, but that there was nothing due to Sibley's estate from the firm, and that the same was indebted to him in the sum of $20,000, and that the firm was insolvent.

After the issue was joined, on motion of H. J. Perrin, the case was transferred to the Kalamazoo circuit, when it abated by the death of Francis.

Francis married Anna L. Montgomery, October 20, 1869, made a will, November 26, 1870, and died the 30th of the same month. By his will he gave to his wife all his property, and made her the sole executrix of his will. The will was duly admitted to probate, December 30, 1870, and letters testamentary were duly granted to his wife, Mrs. Anna Louisa Sibley.

Previous to Francis' death, Perrin had refused to let him have his annuity of $1,000 per year, or the $10,000, as provided in the will, when he should arrive at the age of 25 years. Perrin had never yet rendered any account

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of his doings, and the condition and situation of the Sibley estate, which was now all in his possession; and Francis had died without getting any useful information in relation thereto, and at which time he claimed to be in poverty, while he was really the owner of over $100,000, which he insisted was fraudulently withheld from him, under circumstances most distressing, and in violation of a sacred trust conferred in confidence upon the executors by his father to look after his welfare, and protect and preserve his fortune, and to be so used, in any event, as to minister to his wants, comfort, and necessities; and that H. J. Perrin had assumed the duties of sole executor of his father's will to complete a scheme of fraud, already entered upon, to obtain and absorb the entire estate of Joseph Sibley, both individual and copartnership.

It was under such circumstances that the wife of Francis, now his widow, under the will of her husband, asked of the executor of Joseph Sibley's estate for what had been left to her, and was informed by H. J. Perrin, as such executor, that he did not recognize her rights; that she was not entitled to anything, and that the estate of Joseph Sibley, and the firm to which it belonged, were insolvent; and that he at the same time was prosecuting a claim, before commissioners on the estate of Francis, for making repairs on the estate property for about $17,000; and it appears an appeal by him from the disallowance of such claim by the commissioners, and which was presented in 1871, is now pending in the circuit court for the county of Calhoun.

What was known as the "Tillotson Mill Property," and owned, as Mrs. Sibley supposed, by the Sibley estate, was at this time about to be sold upon the foreclosure of a mortgage that was claimed to be paid. For the purpose

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of preventing this alleged fraud. Mrs Sibley filed a bill in the Calhoun circuit, in chancery, against Perrin and the assignee of the mortgage, to obtain a decree setting aside the proceedings, and the deed obtained thereunder. This suit was, after issue joined, on motion of Perrin, transferred to the Kent circuit, and no further proceedings were had therein.

The bill filed by Francis had now been removed into the Kalamazoo circuit, and Mrs. Sibley's bill to the Kent circuit; and nothing more coming of them, Mrs. Sibley, on April 26, 1872, filed her bill in the Calhoun circuit, setting out the circumstances and situation of the estate of Joseph Sibley, and that of her husband, Francis, as she was informed, and embodying therein the substance of Francis' bill. This bill was filed against H. J. Perrin, Darius Perrin, and such of the Sibley heirs as were then made known to Mrs. Sibley, and in which she complained seriously of the treatment of Horace J. Perrin in regard to the estate, and his refusal to give her any information concerning the affairs thereof, or to allow her such inspection and examination of the books and papers relating thereto as was necessary to a correct understanding of the business of the estate of Joseph Sibley; and prayed for a construction of the fourth clause of Joseph Sibley's will, and that H. J. Perrin might disclose the situation of the firm, and its property, assets, and accumulations, and the extent of the interest of his estate therein, and that the usual partnership accounting might be taken; that a receiver might be appointed to take charge of the partnership property; and, in the meantime, that an injunction might be granted to prevent Perrin from further meddling with the estate.

The mill property having burned down, upon which there was an insurance of about $30,000, Mrs. Sibley filed

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a supplemental bill to obtain a part of the insurance. The injunction asked was granted, and afterwards, on application to a circuit court commissioner, was dissolved, upon the ground that the estate of J. Sibley belonged to his collateral heirs, and not to Mrs. Sibley. Both Horace and Darius made answer to Mrs. Sibley's bill, and a few days thereafter obtained a transfer of the cause to the Jackson circuit.

On October 2, 1872, Mrs. Sibley gave H. J. Perrin the following notice:

"MARSHALL, MICH., October 11, 1872.

"HORACE J. PERRIN:

"You are now formally notified, as you have been verbally notified heretofore, that I refuse assent to any expenditures by way of improvements or repairs being made upon any of the property in which Joseph Sibley, at the time of his decease, was jointly interested with yourself, or with yourself and any other person or persons, either as tenant in common, partner, or otherwise, and in which I claim to be interested in the manner and to the extent set forth in the bill in chancery filed in the circuit court for the county of Calhoun, in chancery, in a cause in which I am complainant, and yourself and others are defendants, and recently ordered to be transferred to the circuit court for Jackson county, in chancery, by William D. Adams, circuit court commissioner.

"ANNA LOUISA SIBLEY."

Failing to get the desired information in relation to the estate of Joseph Sibley, from the Perrins, after waiting several months, Mrs. Sibley sought to obtain the same through the probate court, who, it appears, had, upon its own motion, ordered Perrin to file an account as executor of Joseph Sibley's estate, and for hearing thereon on the 2d day of December, 1873.

A short time before this, H. J. Perrin called upon Judge Douglass, and desired him to wholly withdraw from the prosecution of Mrs. Sibley's claim, and offered to compensate him liberally if he would do so, which, of course, was indignantly declined by that able and distinguished counsel.

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In February, 1874, Mrs. Sibley filed her petition in probate court for an order requiring Perrin to verify, in a proper manner, the executor's account he had rendered, and also to render an account as surviving partner. The Sibley heirs filed their petition about the same time, making a similar request. Answer of Perrin was filed to these petitions, and on the hearing H. J. Perrin was examined as a witness, and a large portion of that examination is made an exhibit in this case. It was in this examination that Mrs. Fisk and her counsel were allowed for the first time to inspect the paper, or knew of the same, dated April 30, 1859. At this stage of the matter these proceedings were arrested by an injunction obtained *ex parte*, in the case transferred to the Jackson circuit, restraining the probate court from further proceedings upon these petitions.

Up to this time Mrs. Fisk claims she had not been allowed to inspect the copartnership books and papers of H. J. Perrin & Co.; neither was her counsel allowed to do so; that from this time until 1880 she had become so impoverished as to be unable to prosecute her claim to the Sibley estate until after H. J. Perrin died, January 11, 1880. Pending these probate proceedings, H. J. Perrin wrote Darius a letter, a part of which is as follows (Darius was then at Rochester, N. Y.):

"Dickey [meaning the probate judge] has made an order to show cause in writing, 17th, why my account should not be allowed. Now, I guess I will turn company matters over to you, as survivor. Can you handle books best here or there, and have you a right to take books out of the state? Powell has written them up, except interest, which I don't know about until settled. Please see what right survivors out of the state have."

He also wrote Darius, April 9, 1874:

"*Dear Darius*: As my health is, I may wish to turn over the books of H. J. Perrin & Co. to you, as

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surviving partner, to settle. You, no doubt, can do the most of it through Mr. Powell, and it may be well for you to write to him through me, with this inclosed to me, authorizing him to act in your absence, to take books and papers, and put in your safe, etc.

"Yours truly,

"H. J. PERRIN."

Powell had been cashier of the company's bank at Marshall, and was Perrin's clerk, and had been in his employ many years. Before H. J. Perrin's death, Mrs. Hannah Sibley had died, and Mrs. Francis Sibley had married Mr. Fisk, whose wife she now is. During the suspension of her proceedings, on account of want of means, she made the necessary arrangements with her attorneys and others for the further prosecution of her claim to the Sibley estate.

After the death of Horace J. Perrin, and on June 20, 1880, his brother, Joel J. Perrin, who had been with him a considerable time during his sickness, and knew more of his business than any one else living, probably, was appointed administrator of H. J. Perrin's estate; and, on the 18th day of February previous, defendant Lepper was appointed executor of the unadministered estate of Joseph Sibley. Soon after Mr. Lepper's appointment, he, as administrator of J. Sibley's estate, brought suit against Mrs. Fisk and the Sibley heirs, for the purpose of having their right to the estate settled under the will. The suit was, however, soon abandoned, because of a delay caused by the attempt to ascertain who were the Sibley heirs, and bringing them in by publication.

For the purpose of securing a judicial determination of this question, however, as preliminary to the recovery of the Sibley interest, Mrs. Fisk brought her suit in ejectment against the Rock River Paper-mill Company for an undivided half of the paper-mill property, which H. J. Perrin had leased to the company as executor, and which

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he could not legally do. The company defended, and the cause was tried in the Calhoun circuit, and resulted in a verdict and judgment for Mrs. Fisk. The Sibley heirs, though not defendants upon the record, removed the cause into the Supreme Court, where at the October term, in 1881, Mrs. Fisk again prevailed. In this case, the Court gave a construction to the fourth clause of the will, holding that, after the decease of Francis M. Sibley, his widow was entitled to all the estate not specifically devised in the will of Joseph Sibley. See *Rock River Paper Co. v. Fisk*, 47 Mich. 212 (10 N. W. Rep. 344).

We have seen nothing in the briefs of counsel in this case, nor heard anything upon the argument, leading us to any different conclusion from the one expressed in that case. It is claimed, however, that the Sibley heirs were not parties to that suit, and are not, therefore, concluded by the decision; that under the pleadings in this case their rights cannot be adjudicated. It is immaterial whether the Sibley heirs are affected or not by our former decision. The pleadings in this case make them all parties, and all have appeared and answered the bill filed. These pleadings show that they claim the Joseph Sibley estate, and that they have a right to be heard upon the administrator's accounting, and deny that Mrs. Fisk has any rights in said estate under the will. Their rights, if they have any at all, are under the will; and the question they raise is a legal one entirely, upon the construction of the fourth clause, and is properly raised in this case. It may as well be decided herein, upon this reference, as upon an application for distribution. Mr. Lepper and Mrs. Fisk, the one as representative, and the other as representative and legatee, desire to have the question thus raised by the Sibley heirs settled.

The will of Joseph Sibley was duly probated, and no appeal from such probate has ever been taken by any one.

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The will vested the entire estate of Joseph Sibley, both real and personal, upon his death, in his son, subject to the rights of the widow therein; and by the will he was only excluded from the use, possession, and enjoyment thereof, for a time, upon certain conditions, which never did, and now never can, happen. It was not necessary that Francis should have the possession and control of the property belonging to Joseph Sibley's estate before he could convey or devise it to his wife. There is no doubt, in our minds, but that it was the intention of Joseph Sibley, by his will, to vest in his son, subject to the provisions made for his widow and the other specific bequests, all his estate, both real and personal, on his death; and the possession and control of the same were only withheld, under the conditions therein named, that the young man might have sufficient time to acquire the knowledge and experience necessary to qualify him for the duties such possession and control, and their proper discharge, imposed.

There is no question, we think, but that Francis M. Sibley was seized of all the real estate, and held the title to all the property belonging to the estate of Joseph Sibley, aside from the specific bequests, at the time Francis died; and that the title to the same, with his rights therein, passed to Mrs. Fisk under his will; and that the collateral heirs of Joseph Sibley have no interest therein.

Much difficulty was complained of by all the persons interested in the Sibley estate, and who sought to ascertain its condition, and the affairs of the firm of H. J. Perrin & Co., in getting at the books and papers belonging to the estate and the firm. It was alleged by all of them that they were withheld by H. J. Perrin, and under various pretenses they were not allowed access to them in his life-time, and after his death the same embarrassments are complained of under the administration of Joel

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J. Perrin, who claims to have acted under advice of counsel in what he did, and the interpretation he gave to the court's orders.

On December 21, 1880, Mr. Lepper served upon Joel J. Perrin, as administrator of the estate of Horace, the following demand:

"To JOEL J. PERRIN,

"Administrator of the Estate of Horace J. Perrin, Deceased.

"*Dear Sir:* As administrator with the will annexed of Joseph Sibley's estate not already administered, I hereby demand of you that you forthwith account for and deliver to me all the unadministered assets of said last-mentioned estate, of which said estate your intestate, Horace J. Perrin, was executor at the time of his decease; said unadministered estate being claimed to include all assets not actually placed in the hands of the creditors, legatees, or distributees, etc., to whom they belong.

"I also demand of you that you deliver to me, as administrator as aforesaid, or deposit with the probate court of Calhoun county for my inspection, all deeds, bonds, conveyances, contracts, or other writings, including books of accounts, and especially the copartnership books of the former firm of H. J. Perrin & Co., in your possession, or within your knowledge, which contain evidence of, or tend to disclose the right, title, interest, or claim of, the estate of said Joseph Sibley, deceased, or of his estate, to any real or personal estate, or any claim or demand.

"S. V. R. LEPPER,
"Administrator as Aforesaid."

This demand was not complied with; and on December 24 he filed in the probate court a petition, praying that J. J. Perrin, administrator, might be ordered to deposit with that court all the books, papers, and documents in his possession or control, relating to the property and assets of the Sibley estate, or the copartnership of H. J. Perrin & Co., and H. J. Perrin's dealings with the same; and that he render just and true accounts, duly verified by him, of Horace J. Perrin's administration of the Sibley estate, including his acts and doings as the surviving partner of the firm. J. J. Perrin was cited to show cause why the prayer of the petition should not be granted, and on March 22 filed an answer. Pending this petition,

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J. J. Perrin was examined on oath on several different occasions touching the matters contained in the petition, but only part of the books were obtained; Perrin claiming he could not find some of them. On February 8, 1881, he disclosed the fact that Perrin had private books at the house where he died, and claimed they were H. J. Perrin's private account-books relating to the business.

On February 23, and after this disclosure, J. J. Perrin filed the original bill in this cause, and on the same day stated the books at H. J. Perrin's house consisted of journals and ledgers; that they contained an executor's account; and, in his answer to Lepper's petition, urged that Lepper has had full access to all the books and papers respecting the property and assets of the firm of H. J. Perrin & Co., or of H. J. Perrin's dealings with the same; and denied the jurisdiction of the probate court to grant the relief prayed, and denied the power of the court to compel him to produce the books of the National Bank of Michigan, or the private books of H. J. Perrin, or the books not specifically mentioned in the petition of Mr. Lepper; also sets forth the pending of the original bill in this case. After a hearing upon these petitions, the probate court granted the relief prayed in the main. From this order J. J. Perrin appealed to the circuit court, in which, on the 23d day of December, A. D. 1881, the order of the probate court was substantially affirmed, except that the books and papers were to be examined and remain at the National Bank of Michigan, and that the account need not be on oath. This order was complied with only in part by J. J. Perrin. Mr. Lepper made demand for full compliance, and, on being refused, asked that Perrin show cause why he should not be punished for contempt, on refusal to produce the books and papers demanded by Lepper; but, before the hearing on this citation was had, Perrin removed the dis-

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covery order into this Court for review upon *certiorari*, and obtained a stay of the contempt proceedings. On October 11, 1882, this Court affirmed the order as modified by the circuit judge; holding that the probate judge had jurisdiction in the matters. See *Perrin v. Judge*, 49 Mich. 345 (13 N. W. Rep. 767).

The defendant Mrs. Fisk had demurred to the original bill in this case, on the ground that it did not state the account of H. J. Perrin's administration of Joseph Sibley's estate. The question of jurisdiction was also raised, and the necessity to make the Sibley heirs parties. Lepper filed a plea, in which he urged the pending of his petition, and the proceedings thereunder, in probate court. The matter of these pleadings was heard in the circuit, on February 21, 1882, in which a decree was made by the circuit judge, sustaining both the demurrer and plea, and dismissing the bill, although he held the Sibley heirs were not necessary parties; this Court having previously held they had no interest in the Sibley estate in the *Case of the Rock River Paper Co.* Perrin appealed from this decree to this Court, which affirmed the decree at the circuit, except that it allowed the suit to stand, and Perrin to amend his bill, if he desired so to do. This Court held the probate proceedings did not prevent this suit in equity, if otherwise proper. See *Perrin v. Lepper*, 49 Mich. 347 (13 N. W. Rep. 768). A long struggle then ensued between the complainant and Lepper and Fisk and their counsel, in the efforts of the latter to obtain access to the books of the firm, and such books and papers as showed H. J. Perrin's management of the Sibley estate, individual, partnership, and tenant in common. These efforts were made under the several orders of the judge of probate, and, owing to the construction given to them by Joel J. Perrin and his counsel, the investigation became very perplexing and tedious, and procrastinated

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the proceedings to an intolerable extent. It not only necessitated the employment of lawyers, but expert accountants, to make the examination.

This was not the treatment the heir or representative of the interest of a deceased partner, looking after his or her interest in the firm estate, should receive from a survivor, or his representative, possessed of all the property, and with all the books and papers relating thereto. Such treatment was a serious charge to bring against a trustee, who, on being asked simply to account for the trust property committed to his charge, and pay it over to the owner when the trust had expired, refused so to do, and such a course is looked upon with abhorrence in a court of equity. Even as between tenants in common, their interests require the utmost fairness on the part of a survivor. These books and papers were the common property of these parties, and about the only sources of information left to the defendants; and after examining and studying such as they could find in the public records, and such as they were permitted to examine, for weeks and months, with such book-keepers, assistants, and accountants as they could procure, and frequently traveling hundreds of miles in pursuing transactions partially disclosed by the books, sometimes with success, and as often without any satisfactory results, with such information as the defendants could obtain from the only parties who could give any, and who were inimical to their interest, and often led astray by them, defendants Lepper and Fisk made, on January 11, 1884, their answer to the complainant's bill, which had been filed January 30, 1883, by complainant. The answer contains 189 printed pages in the record, in 203 paragraphs. The contents of these pleadings, or even a full synopsis of them, will not be attempted in this opinion. We shall content ourselves with such references thereto only as may be necessary to

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a correct understanding of the views we have taken, and the conclusions we have reached in this case. The amended bill contains, with the schedules, 307 pages.

The complainant, as administrator, in his bill gives what purports to be a full account of the formation of the partnership of H. J. Perrin & Co., and its dealings and business while it was in existence. Schedule A, attached, presents a showing, as complainant claims, of the ledger balances, assets and liabilities of the firm on September 8, 1864, and the disposition made of them by the surviving partner (complainant still claiming that Darius Perrin was a member of the firm). Schedule B is a statement of the indebtedness of the firm when Joseph Sibley died. Schedule C is given as accounts of H. J. Perrin as surviving partner, from September 8, 1864, to January 11, 1880, with fourteen pages of explanations; the latter containing the assignment and transfer to the bank of Michigan of $137,187.11, in mortgages owned by the firm, which guaranteed the payment of the same to the bank when matured. Said assignment is made by—

"H. J. Perrin & Co., owner in fact, as per their company books;" "H. J. Perrin, executor of J. Sibley, deceased;" "Darius Perrin, by H. J. Perrin, atty. of record;" "H. J. Perrin, survivor of himself and J. Sibley, deceased;" "Darius Perrin, for self and surviving partner."

This assignment is claimed to be void by defendants.

The bill states that six parcels of real estate belonged to the firm at the time of Sibley's death; that all but one of these have been so managed by H. J. Perrin, that the titles of the same are now held by relatives of H. J. Perrin,—the title to one parcel being in H. J. Perrin and Joseph Sibley; and some of those in whom the titles have been so placed now claim to be owners of the land, and propose to contest the firm's right to the same. Complainant claims that those holding the titles have

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paid no consideration therefor, and the firm estate is the equitable owner thereof.

The bill further states that about $104,000 was the capital put into the firm by Sibley, and that Schedule E shows in what it consisted; that Perrin put in as capital about $123,000, and, at the time of Sibley's death, it amounted to about $189,000, but it is not stated in the bill, or in any schedule, in what it consisted; that the capital of Joseph Sibley shrank $7,000 by reason of failure to collect the securities; that it was further lessened by his purchase of real estate to the amount of about $70,000 shortly after the firm was organized, and that by reason of the amounts withdrawn, and the losses sustained by the firm, Sibley's interest therein at the time of his death amounted to nothing, as complainant is informed and believes, and that such proved to be the case upon payment of the debts of the firm, and closing up its business; that some of the business done by the firm was profitable, and some was not; that when Sibley died, the indebtedness of the firm, including the capital put in by the partners, was $700,000, as near as complainant could ascertain the same from the books, and that Schedule A contains a statement of the indebtedness, and of the liabilities, and Schedule B of the gross indebtedness; and that Schedule C contains, with the explanations, as full and complete a statement as he is able to make of the transactions of Horace J. Perrin as surviving partner; that Schedule D is taken from the books kept by Horace, and shows the balances as surviving partner up to the time of his death; that Schedule F is a statement of the liabilities of the firm paid by Horace after Sibley's death, and also the moneys received from the assets of the firm, as near as complainant can make the same, and in effect contains a full statement of the result of his administration of the affairs of the firm; and complainant further

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says that said schedules have been made upon a thorough examination of all the books and documents in his possession relating to the affairs of the firm, aided by expert accountants and book-keepers, who were familiar to a great extent with the affairs of the firm; and he believes the schedules are correct, and asks that all the schedules may be taken as part of his bill.

Complainant further says that the assets of the firm, without stating their value, consisted of the real estate hereinbefore referred to, and that the liabilities were $92,045.77 at the time Horace J. Perrin died; that of all such indebtedness was to H. J. Perrin, less $2,439.56, which was owing to Joseph Sibley's estate; and further says that said firm sustained large losses while doing business, and that upon closing up the same there were no profits remaining to be distributed; and that Horace J. Perrin, in order to pay the liabilities, had to pay large amounts of money from his own means, and for which said firm is now indebted to his estate.

Complainant further says he is informed Darius has the $12,000 mortgage given by Elizabeth C. Perrin to the firm, and that the same is subject to his control, and other mortgages and choses in action which belong to the estate, and that a receiver ought to be appointed to take possession of the real estate mentioned, as the assets of the firm, and collect the rents and profits thereof, to be disposed of as the court may direct.

The bill then sets forth at some length the tenant in common property, claiming the mill property on the Kalamazoo river, in the city of Marshall, and lot 521 adjoining the same as part therof, and the improvements made to the same, and mills thereon, hereinbefore described, by H. J. Perrin, and the several agreements of Francis M. Sibley relating thereto, numbered from 1 to 6, as heretofore given; and avers that young Sibley, as

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heir of his father, had authority, notwithstanding anything contained in Joseph Sibley's will, to bind the estate for one-half the expense, as agreed upon, of said improvements, mentioned in said papers, and in pursuance thereof H. J. Perrin made the same, and that, under the assignment to Darius Perrin in No. 2, Darius received a large amount of rents and profits, and of which Schedule H is a correct statement, and that the same were disposed of as contained in said schedule; that the leases assigned to Darius were of the stone flouring-mill to July 9, 1872, and claimed to have been discounted by Darius at the sum of $10,657.03; lease of the custom-mill to August 21, 1871, at the sum of $4,037.08; lease of paper mill to February 15, 1872, at $5,909.60; lease of machine-shop to August 21, 1871, at $2,953.15; lease of planing-mill to October 1, 1871, at $2,126.28.

That after the burning of the stone mill, in January, 1867, and in 1872, said stone mill, custom-mill, and plaster-mill, and many other buildings on said property were all destroyed by fire, at a great loss to the owners, and rendered the water-power comparatively useless without them: that Horace acted in regard to the use and improvements of said property, until Francis became of age, upon his own judgment, and after that, in conjunction with him, who concurred in all that was done; and complainant claims that Horace's estate is entitled to be re-imbursed from the Sibley estate for one-half of such improvements, and for caring for the property; and that Exhibit G is a complete statement and account of H. J. Perrin, with all the tenant in common property at the time of Sibley's death, including the Marshall House property, down to May, 1869, since which time the accounts with said property have been kept with the executor's accounts of Horace J. Perrin, which is found in Schedule I attached to the bill.

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And complainant avers that the amount due the Perrin estate upon said tenant in common property from the estate of Joseph Sibley is about $35,000, and he is unable to settle the estate of H. J. Perrin, as administrator thereof, until the tenant in common accounts have been adjusted: that H. J. Perrin received letters testamentary in the estate of Joseph Sibley on the 7th day of October, 1864; that from time to time after his appointment he filed his accounts as executor with the probate court of Calhoun county, but none have ever been allowed or passed upon by that court; that Schedule J, annexed to the bill, is a statement of the ledger balances on the books of H. J. Perrin, as executor until Perrin died. Complainant prays:

1. That a receiver may be appointed to take possession and charge of, and receive the rents and profits of, the firm's real estate before mentioned.

2. That the usual partnership accounts may be taken in respect to the affairs of the firm of H. J. Perrin & Co. from its commencement, and the share or interest of each of the parties thereto ascertained.

3. That the partnership real estate mentioned be decreed to be assets belonging to the firm, and that the same may be sold, and the proceeds distributed to whomsoever they belong, as shall appear upon the accounting.

"4. That it may be decreed that said Francis M. Sibley had full power to and did bind the estate of said Joseph Sibley and of Francis M. Sibley, by the said several instruments in writing, designated in this bill as Nos. 1, 2, 3, 4, 5, 6, and that an account may be taken of the dealings of said Horace J. Perrin, with the property hereinbefore described as owned by himself and Joseph Sibley as tenants in common, at the time of said Sibley's death, and that the balance due said H. J. Perrin on said accounts may be ascertained and liquidated, and that the same may be decreed to be paid to your orator out of the assets of said Sibley's estate, and that the same may also be decreed to be a lien upon the individual half of said property owned by the estate of said Joseph Sibley or his representatives, and that the said Sibley interest in said property may be sold, and out of

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the proceeds the amount due the estate of said H. J. Perrin may be paid.

"5. And that an account may be taken of the dealings of the said Horace J. Perrin with said estate of Joseph Sibley, as executor thereof.

"6. That the said Sibley heirs may be made parties defendant to this suit, and required to answer this amended bill of complaint, and that it may be adjudged and decreed by this honorable court whether the said Sibley heirs have any rights or interests in said estate of Joseph Sibley, or any right to an accounting with your orator in respect thereto, and which of said parties are entitled to such an accounting, and that the accounting in this suit between your orator and the representatives of said Joseph Sibley and the said Anna Louisa Fisk, or the said Sibley heirs, or either of the parties entitled thereto, in respect to the matters alleged in this amended bill, may be final and conclusive, and bar and preclude all of the said parties from making any further or other claim against your orator on account of their alleged interest in the said Sibley estate.

"7. And that your orator may have such other and such further relief in the premises as the circumstances of the case may require, and to this honorable court may seem fit."

This bill, filed in February, 1881, was perfected by amendment, and refiled January 30, 1883. The time intervening between these two dates the record shows was given by Lepper and his counsel, and by Mrs. Fisk and her counsel, to the most vigorous efforts in obtaining—

1. All the books and papers then in existence, containing any and all the evidence relating to the business of the copartnership conducted by the firm, while the same existed, and showing its condition, and the situation of the property when Joseph Sibley died.

2. In acquiring knowledge from every available source showing the management of the firm and tenant in common property, and the individual estate, under the trusts confided to, and the requirements which the law laid upon, Horace J. Perrin in their management, and what

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disposition he made of the Sibley interest after Sibley died, so long as Perrin had the control and management of the property."

They brought to their aid in these efforts all the means apparently within their power, and for this purpose gave their entire attention to the work, and secured the assistance of skilled accountants to aid them in such examination of the books and papers as could be obtained, and in making up proper accounts; but the same difficulty was encountered by them all which had been met by all persons who undertook to make such examination from the time Francis M. Sibley became of age to the day complainant's amended bill was filed. It was the difficulty in obtaining the necessary books and papers or information from those who knew all about the matters under investigation, but withheld the same when properly called for; and the marked ability and perseverance of the learned and distinguished counsel for the defendants, brought to bear in their efforts as the work of investigation progressed, as we have had occasion to observe them in making our examination of the record, have challenged our admiration.

The persons living who knew very much about the books and papers desired were William Powell, who was H. J. Perrin's clerk and book-keeper from May, 1860, for six years continuously thereafter, and who kept the books during that period, and then again re-entered the service of H. J. Perrin in Chicago, and while in his employ went to New Haven, and there sold flour, feed, and grain, the products of the mill, and did the same in Rhode Island, remaining there until he returned to Marshall, in 1872, where he continued in Perrin's employ in the National Bank of Michigan as its cashier, until the month of May, 1880. This bank was the successor of the Bank

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of Michigan, which was run by the firm until the National Bank was organized, in January, 1866, and the books of which were kept by Mr. Powell, as were those of the National Bank thereafter. In keeping the Bank of Michigan books, and those of the firm, Mr. Powell was assisted by William E. Gill, another book-keeper and accountant, who was the other person who had knowledge of the things desired and queried after by the defendants; and it would appear from the record that the complainant had only such knowledge of the transactions of the firm as the books and papers gave him, aside from what information he obtained from H. J. Perrin in his life-time (of which we get little aid from the record), and what was communicated to him by these two clerks and accountants.

It may or may not be a misfortune that Francis did not have the aid of Mr. Powell, before he died, in his efforts to obtain the estate which he claimed. Powell, certainly, as he says in his letter to the attorneys of Francis in 1868,—

"Probably knew more about their [meaning the firm] affairs than any one else beside themselves;" that he "had charge of their banking office, kept the books, not only of their banking business, but of all their outside business,"—

From the spring of 1860 to 1866; and, after reading H. J. Perrin's answer to Francis' bill, wrote him from Chicago, in November, 1868:

"There is a nigger in the fence. * * * H. J. P. was here a week ago to-day;"—

And in March following wrote Francis:

"You are being swindled outrageously."

This man and Mr. Gill have been with the Perrins in their contest with the Sibley estate, and it is through their manipulation of the books and papers that the com-

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plainant has been able in his bill to say and aver that the firm was insolvent, and the estate of Joseph Sibley is worthless; when it is now conceded that in fact the firm was solvent, and H. J. Perrin died owing to the Sibley estate a very large amount of money. The books of the Bank of Michigan were never found. They were either withheld or destroyed. There was no way until a short time before the defendants Lepper and Fisk filed their answer by which they had been able to get at the true relation of that bank to the firm. The examination of defendants, however, about that time, accidentally disclosed the paper known in the record as the "Anomalous Instrument." After this disclosure, and some others, then and subsequently occurring, the defendants Lepper and Fisk proceeded to make their joint and several answer to the complainant's amended bill. It and the schedules thereto annexed contain 189 pages of the printed record.

This answer alleges that H. J. Perrin, when he came to Marshall, had but little capital; that at brief periods prior to October 11, 1858, he was in partnership with Darius Perrin; that it was his practice during this period to hold out to the community that Darius was his partner, when, as between themselves, he was not, and that this was done with Darius' consent; that prior to April 3, 1850, H. J. Perrin became the owner of the Kalamazoo River Mill property, except lots 1 and 3, with the water rights appurtenant thereto, and on that day conveyed the same to Darius; that before January 28, 1858, he purchased lots 1 and 3, and conveyed them with the other lots to his sister Anna Perrin, a young lady without means or responsibility, and who it is claimed executed back to Horace a mortgage for $75,000; this mortgage was never recorded, and has never been produced, and it is claimed was entirely fictitious, and represented

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no actual indebtedness, and created no lien, except on lots 1 and 3; that May 10, 1860, Anna Perrin, then Anna Tuttle, redeeded all the lots to H. J. Perrin by a quit-claim deed; that Perrin carried on business alone from July 1 to October 11, 1858; that in 1857 the mill on said lots burned, and was rebuilt by Perrin, at a cost of about $14,000; that prior to 1858 he carried on the banking and grain business with Charles T. Gilbert, sometimes using the name of Perrin & Gilbert, and sometimes H. J. Perrin & Co.,—Gilbert contributing considerable of the capital; that Perrin and Gilbert or H. J. Perrin, early in 1858, organized the State Stock Bank of Eau Claire, Wis.; that prior to October 11, 1858, state bonds of the nominal value of $120,000 had been deposited with the state treasurer to the credit of the bank, and $100,000 in currency had been issued thereon, and of this circulation Perrin's individual books show he received $31,500. It does not appear what became of the rest. This firm was dissolved July 1, 1858.

The answer further alleges that Perrin's business in the fall of 1858 had become greatly extended, and that he was in peril of being compelled to suspend payment; that his business was done largely on borrowed capital, and, in this crisis of his affairs, he sought Joseph Sibley, and engaged him in the partnership composing the firm of H. J. Perrin & Co., which was formed, as before stated, October 11, 1858.

They deny that Darius was ever a member of this copartnership, notwithstanding his name was sometimes used as a partner, and may have been such as between himself and Horace J. Perrin; aver that he never put in any capital, and the partnership books contain no evidence that he was a partner, but much tending to show he was not, and that he became insolvent as early as 1864.

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They admit that the partnership between H. J. Perrin and Sibley continued until Sibley died, and aver that the renewal article does not contain the words, *"all interest in each's capital and paper to be seven per cent. from 1858;"* that H. J. Perrin fraudulently inserted these words at the end of the instrument after Sibley died; that, while Sibley put into the capital about $104,000, no account was kept upon the company books of the amount contributed by Horace; that the accounts are so fraudulently kept with Horace that it is impossible to tell what he did contribute as capital, but that one item of his claimed capital was the fictitious $75,000 mortgage credited to Perrin December 31, 1858, and which when so credited amounted to $79,913.20; that eliminating this fraudulent and worthless item to the credit of H. J. Perrin on the partnership books, and where it is claimed his capital appears, the books show that there stood to his credit, on December 31, 1858, $38,792.96, which includes mortgages to the amount of $18,607.23; June 4, 1859, $45,813.52; September 9, 1859, he was credited for State Stock Bank, Eau Claire, $32,935.34, put into the firm as of October 11, 1858,—making a total credit then $80,414.38; April 1, 1861, it was $43,579.48; January 1, 1862, $44,897.43; January 1, 1863, $46,515.28; January 9, 1864, it was increased to $110,003.43, the increase made up by a credit of $65,000, under date of November 19, 1863, it being Sibley's check for that amount on his purchase of one-half of the Kalamazoo River Mill property, and without this, at the time of Sibley's death, it was but $45,003.43,—and that if the real estate purchased and improved from partnership assets during the existence of the firm was the individual property of Perrin, as is now claimed by complainant, his capital stock would have been very much lessened

And further say they deny the capital of Joseph Sibley was lessened by his drafts upon the firm to the amount

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of about $70,000, and which was used up by him in the purchase of real estate soon after the formation of the firm, which, with losses of the firm in its business, exhausted the interest of Sibley in the firm.

They aver that the business of the firm resulted in large profits; that Sibley never drew out any portion of his capital; that his capital account was never encroached upon, and that his drafts were all upon his individual account during the existence of the firm; that until October 19, 1863, he drew no drafts or checks upon H. J. Perrin & Co. exceeding the amount standing to his credit on his private account, and they are informed and believe that there was due to him from the firm at the time the draft of $65,000 was made a sum largely in excess of that amount; that Perrin transferred his interest in the Eau Claire Bank, which was the controlling one, to the firm, and took credit on the books for the same, as before stated, and before the 1st of January, 1859, Joseph Sibley was made president of it, and H. O. Pratt, the clerk of the firm, was made cashier of it, and so remained while that bank existed; that, during the first two years of the partnership, H. J. Perrin & Co. deposited with the state treasurer of Wisconsin state bonds to the amount of $361,700 face value, and received the circulating notes of that bank to the amount of $175,000; that in December, 1859, H. J. Perrin & Co. organized, under the general banking law of the state of Illinois, three more banks, similar in character to the Eau Claire Bank, Wis., and between March 15 and August 30, 1860, they deposited with the treasurer of the state of Illinois, in the name of the State Stock Bank of St. Johns, state bonds to the amount of $169,250, rated at the time at the sum of $151,610, and received circulating notes to the last-named amount; that between July 14, 1860, and January 2, 1861, they deposited, in the name of the Commercial Bank of New

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Haven, state bonds to the amount of $83,000, rated at $67,980, and took out circulating notes to that amount; and on November 5, 1860, they deposited, in the name of the Cumberland County Bank, state bonds to the amount of $54,000, rated at $50,780, and issued their circulation to the amount of $50,778. The aggregate amount of bonds deposited in these four western banks was $667,950 face value, and the circulating notes received by them were $443,191. The bonds all drew interest.

These banks were used as instrumentalities of the firm of H. J. Perrin & Co., and the circulating notes were used by the firm in the business of banking, buying wheat, making flour, buying wool, and loaning out on bonds and mortgages. The State Stock Bank at Eau Claire always stood (except a trifling number of shares) in the name of Oliver C. Perrin, a brother of H. J. Perrin, a young man without means, who resided at Rochester, N. Y., and who had no actual interest in the bank. The articles of association of the three Illinois banks were each signed by Anna P. Tuttle, the sister of H. J. Perrin, and A. W. Nason. She was represented as the owner of 2,995 shares of capital stock of each bank, and said Nason the owner of the other 5 shares, and neither of whom was responsible, or had any actual interest in the banks, and neither of these western banks had any capital other than the bonds deposited in its name. H. J. Perrin was president of the State Stock Bank of St. Johns, and of the Commercial Bank of New Haven, and A. W. Nason, cashier. A. W. Nason was president of the Cumberland County Bank, and E. Nason, cashier.

In 1861, during the panic, all these banks suspended, and went into liquidation, except the Cumberland Bank, and that did for a time. In December, 1861, the bills of these banks were quoted from 50 to 75 cents, and in May the Eau Claire Bank from 30 to 60 cents.

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Defendants further say for a year and a half prior to this H. J. Perrin & Co. had a branch banking office at Chicago, under the immediate management of H. J. Perrin, who spent much of his time there looking after these western banking operations. On May 1 he wrote to H. J. Perrin & Co., at the home office, as follows:

"H. J. PERRIN & Co.,

"Marshall:

"Will telegraph you in the morning to handle no more western, as I think there will be a general crash here in less than ten days. It is fortunate I came over, as we are now all cleared up, no currency on hand, and owe no one, while we hold the grain receipts for what is due. I expect there will be trouble in New York, and general suspension, and I should again recommend doing nothing except with full receipts for flour."

The defendants further aver, upon their information and belief, that in the company's western banking operations, including their dealings in discredited circulation, they made very large profits. They further show that the company's Bank of Michigan, located at Marshall, started in 1862, with a capital of $50,000, which in April, 1863, was increased $10,000, and in November of the same year was again increased $50,000; that the Bank of Michigan was organized under the general banking law of Michigan; that its articles were signed by the said Anna P. Tuttle, who is represented as owning 495 shares, Sibley 3 shares, and Perrin 2 shares; that Mrs. Tuttle never had any interest in the bank, and was irresponsible, but her name was used that personal liability of H. J. Perrin & Co. might be avoided for any indebtedness of the bank; that the firm deposited Indiana and Illinois state bonds to the amount of $104,428, upon which they obtained circulation to the amount of $78,892, and which was used in the business of the firm; that at the time Sibley died there was on deposit of the bonds $78,968, and the circulation then outstanding was $74,392; that the circula-

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tion was all redeemed, and the bonds withdrawn, by H. J. Perrin before June 2, 1868; that during the partnership it had no capital other than the bonds to secure circulation; that this bank, like the western banks of the company, was a mere instrument by which H. J. Perrin & Co. obtained its currency to carry on its business and loaning money; that during the entire existence of the partnership, from its beginning to its close, the regular banking business—receiving deposits, selling exchange, discounting commercial paper, and also the loaning of money on bonds and mortgages in the copartnership name—went on as if the banks they organized did not exist, and was constantly and rapidly increasing, making profits in all the business in which the firm was engaged.

The real estate in which the firm dealt largely the defendants say was purchased with partnership funds, and, as they verily believe, was all partnership property, and was mostly taken in the names of some one or more of the Perrin family,—occasionally in the name of J. Sibley; and they aver there is nothing on the books tending to show that it was the individual property of either of the parties. Defendants then call attention to 23 parcels of real estate, some of them containing very large quantities of land, the equitable title to which was in the firm at the time Joseph Sibley died, except as contracted away or conveyed by it.

Defendants next give in detail, so far as they can, the dealings with the same by H. J. Perrin; also of the other kinds of business; and call attention to the changed condition of the deed of the Montcalm county lands.

They further show that at the time of Sibley's death the firm of H. J. Perrin & Co. were carrying on farming on ten of these farms, lying in the vicinity of Marshall, and had thereon a large quantity of stock and tools for that purpose, and a very large quantity of sheep, some of

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which they kept on the farms, and others they let out upon shares to farmers; that their stock of horses was large, consisting of 41 horses and colts, and 18 mules, besides such as had been bred upon the farm.

Defendants further state that on April 30, 1859, H. J. Perrin executed to H. J. Perrin & Co. a quitclaim deed of Mill lots 1, 2, 4, 5, 6, 7, and 8, in Marshall, heretofore referred to, the legal title to which stood in Darius Perrin, except lot 1, which stood with lot 3, in Anna Perrin, subject to the $75,000. It also covered other lands to large amounts lying in Calhoun, Jackson, Allegan, Oakland, Van Buren, and Montcalm counties, to some of which the record shows title in Perrin, and to some of which it does not. This deed as drafted, and as the defendants believe read when executed, was made to "H. J. Perrin and Joseph Sibley, composing the firm of H. J. Perrin & Co.," but, as it appears of record, it now reads: "Horace J. Perrin and Joseph Sibley and Darius Perrin, of the firm of H. J. Perrin & Co.;" and the defendants charge, upon information and belief, the change was made by H. J. Perrin after the deed was executed, and before its recording, which was not until November 10, 1860; and that by deed dated April 9, 1860, but not acknowledged until December 31, 1863, or recorded until June 11, 1867, Darius Perrin quitclaimed to Horace J. Perrin all the lands described in the deed of April 30, 1859, except the Mill lots. By another deed dated March 4, 1862, acknowledged April 3, 1862, and recorded November 2, 1864, Darius quitclaimed to H. J. Perrin all the lands described in the deed of April 30, 1859.

That by a transaction commencing in the fall of 1863, and consummated in January, 1874, Joseph Sibley was induced to purchase the undivided half of the Mill property, at the price, as is claimed, of $65,000. This Mill

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property, which was sold to Sibley, was conveyed by warranty deed by H. J. Perrin, dated, as shown by the record, December 6, 1861, and recorded November 23, 1863. It appears to have been acknowledged December 6, 1862; and it is alleged that the "one" in the date of the deed is written over an erasure, and defendants are informed that it was a common practice of H. J. Perrin to postdate deeds, and other instruments, and to procure certificates of acknowledgments by Powell and A. H. Holmes, as notaries, to be falsely dated, or to be signed in blank, and be filled up by himself afterwards; and they charge that this was antedated for the fraudulent purpose of a certain mortgage transaction bearing the date of December 6, 1861.

And it is further claimed that this deed was dated back to 1861 for the purpose of limiting the right of flowage to such lands only as H. J. Perrin had at that time. The rents and profits of the property were reserved in this deed until November 19, 1868.

Defendants further allege that H. J. Perrin claimed and exercised the powers of testamentary guardian of Francis during his minority, and also claimed to exercise the power and control and management as trustee which the will gave to the executors; that Francis was entitled to receive, under the will of his father, $3,000 when he became of age, and $1,000 thereafter per year until 25 years old; that whether after that time he should receive anything more than his annuity for life depended upon his (Horace's) opinion of Francis' capacity; that H. J. Perrin, thus entrenched in the possession of all of Joseph Sibley's estate, with its rents and profits, and of all the papers relating thereto, and nearly all other information, with no one to call him to account but the youthful heir, who lived in fear, if he displeased Horace, of being cut off of what he conceived to be a paltry annuity, the

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executor proceeded, by an almost infinite variety of methods, to fraudulently appropriate the estate to his own use; that he filed a false and fraudulent inventory of the Sibley estate; that it is unintelligible and misleading; that it falsely and fraudulently represented the estate as having, as tenant in common, a one-third interest in two farms, a one-half interest in the mill, a farm, and the Marshall House, and one-sixth interest in a hall, a hotel, and the Marshall House, whereas, with the exception of the hall and hotel, they were all the property of H. J. Perrin & Co., and of the hall and hotel the firm owned an undivided half, and the estate had no interest in either; that he permitted large claims in his interest to be allowed against the estate, and no proper notices of the meetings of the commissioners were given; that he permitted claims to be allowed against the estate which were against H. J. Perrin & Co., while he, as surviving partner, had the money and assets in his hands to pay the claimants, and also permitted fraudulent claims to be allowed against the estate.

Defendants further say they deny that Francis acted in conjunction with H. J. Perrin, or assented to the improvements made by H. J. Perrin on the tenant in common property, or that he ratified and confirmed all the expenses in making the same after he became of age, but admit he made no active opposition while the improvements were being made; and they aver it was not for Francis' interest to make such improvements, and that Perrin denied to Francis the privilege of examining the vouchers and books necessary to ascertain the expenses actually incurred in making same, and that such cost was greatly less than the amount charged by Perrin; that the rebuilding of the stone mill after taking out the insurance was less than $13,000, and the half of the same, now charged to the Sibley estate at $18,000, is $5,843.36; that this appears

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from what is found on H. J. Perrin's private journal and ledger; that they aver that the instruments signed by Francis in regard to such improvements were obtained by misrepresentation and fraud and intimidation.

Defendants further aver that the leases of the tenant in common property to Darius Perrin until the receipts should pay $31,000, or until said sum and interest were paid, were a sham, and a fraud between Horace and Darius for the sole purpose and object to render it more difficult for Francis to rescue his father's estate from the grasp of H. J. Perrin; that Darius never advanced a dollar of the $31,000, but at that time was insolvent, and ever since has been, and that the rents and profits of said property were received by Horace, as is shown by what is left of his books; that Francis did not, during his life-time, have knowledge of the frauds that had been practiced upon him as the heir to his father's estate.

Defendants further say that Francis' mother, Joseph Sibley's widow, was then alive, but could give him no aid in looking after his interest, in protecting it against the frauds of Perrin; that she was an infirm woman of feeble intellect, and incapable of advising him in business matters, and that Horace very soon, by the course he took with her, gained great control over her, which neutralized her influence, such as it was, in behalf of her son, and she was even induced to file a very large and unnatural claim against his estate.

Defendants, further answering, aver that the entire stock of the Bank of Michigan was owned by the firm of H. J. Perrin & Co.; that there was no separate ownership in either of the partners; that the capital was the bonds deposited to secure the circulation, and the stock represented nothing but these bonds; and that whether the pretended checks, one of Joseph Sibley for $10,000, and of H. J. Perrin & Co. for $80,000, for this stock,

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were ever given during Sibley's life-time or not, is immaterial, as, between the parties owning the bank, they represented no indebtedness whatever.

Defendants further aver that the information Horace J. Perrin pretended to furnish to those interested in the property of the firm, and of the estate, from Sibley's death to the time of Perrin's death, and that contained in his inventories filed and accounts left with the judge of probate, and given in his answers to the several bills in chancery filed against him, or in any other way, was so meager, fragmentary, and false, and the statements so inconsistent and confusing, that but little light, and less satisfaction, could be obtained therefrom; and they further aver that, since the death of Horace, his executor, as well as his assistants, claimed and deposed to such ignorance of the matters relating to said firm and estate, although in possession of all the books and written information relating thereto, that defendants have with great difficulty got any information of importance from them.

Defendants further say that the information which they have been able to get of the affairs and condition of the firm, and its operation, and the condition of the estate, has been from the examination of such books and papers as they have been able to find mostly; but these were erroneously and fraudulently kept, from a very early period in the partnership, and especially during the last year of Joseph Sibley's life, when he had become very infirm and feeble, both in mind and body, so as to be unable to pay, and did pay, but little attention to business matters; that there was no detailed statement of the operations of the firm appearing at the time of Sibley's death, and no correct one since.

Defendants further aver that H. J. Perrin, on the 19th of October, 1864, transferred to the Bank of Michigan all, or nearly all, of the debit and credit balances on the

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partnership books, and thereafter kept the partnership accounts, and the accounts of his dealings with the partnership assets, for the most part, on these books, down to January 1, 1866, and to some extent, as to some accounts, for a long time thereafter, and he treated this transfer as a sale of the copartnership assets to the Bank of Michigan, and, as he claimed, to provide funds to pay the partnership liabilities; that, by this same proceeding of H. J. Perrin, the bank became the owner of the bills receivable, bonds, and mortgages, and the other assets of the firm; that, if the bank had any stock, it all belonged to H. J. Perrin & Co., and, it not being quite clear to him that all the interest of the Sibley estate had passed to the bank, he caused the following instrument to be made and executed; it being the anomalous instrument heretofore referred to:

"WHEREAS, the firm of H. J. Perrin & Co., consisting of Darius Perrin, Jos. Sibley, and H. J. Perrin, of Marshall, Michigan, did in the month of November, 1862, and during the year 1863, purchase certain bonds, and exchange the same with the Treasurer of the State of Michigan for bills of circulation issued to the Bank of Michigan, at Marshall, Michigan, the stock of which was taken mostly by Anna P. Tuttle, said firm of H. J. Perrin & Co. being unwilling to become liable for the redemption of said bills, as stockholders of said bank, but did open an account on their said firm books, charging said bank with what money they used in the purchase of bonds pledged in exchange for circulation with State Treasurer, and crediting said bank on their said company books with all said circulation so obtained and received in exchange for or on the same from time to time; there being no capital paid in, except in so purchasing said bonds, which was mostly immediately re-imbursed by the issue and return of bank currency issued by said State Treasurer for said bonds,—all of which transactions and doings were kept on the books of said H. J. Perrin & Co., no books being opened by said Bank of Michigan until the 18th of October, 1864.

"But whereas, said bank had agreed for a banking-house previous to the death of Joseph Sibley, and had made checks on said so styled bank, signed, 'H. J. Perrin & Co.,' by said Joseph Sibley, for the sum of $80,000, said bank not then having any capital paid in (except such as had been previously repaid by its bills so issued

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by said State Treasurer) wherewith to pay any portion of said checks so drawn by said Joseph Sibley in his life-time, or any capital or money of any considerable amount paid in, except what had been so paid for said bonds so hypothecated with said State Treasurer.

"And whereas, this company has no funds to contribute wherewith to pay said checks so drawn by said Sibley on said bank in the name of and for said H. J. Perrin & Co. on said so-styled 'Bank of Michigan,' in the name of said H. J. Perrin & Co.

"Now, with a view of closing up any liability growing out of said checks, or any agreement relating to the bank building, it is agreed that the checks so drawn on said bank for the said $80,000, by said H. J. Perrin & Co. (for which said stock was never transferred by the original subscribers), may be paid by disposing of so much of said stock, now treated as so much stock, namely, $80,000, if the same can be done at par; that is to say, we, the surviving partners of the firm of H. J. Perrin & Co., fully authorized under the articles of copartnership to finally settle all matters relating to said partnership, do hereby agree, consent, and direct that whereas, the estate of said Joseph Sibley has treated said checks as debts, that said stock be so sold at par,—that is to say, that said stock may go to offset said checks, so drawn on said nominal Bank of Michigan, in the name of H. J. Perrin & Co., and used as an offset to the same, be so disposed of as soon as practicable, which, when done, is to release the said H. J. Perrin & Co. from all liability in any way with said bank; our object being to be released as a company and individually from all transactions, either past or future, with said bank,—it being considered that the depreciation on building, corn, etc., should prevent any further claims.

"*December* 8, 1865. H. J. PERRIN,

"One of the Survivors of H. J. Perrin & Co., and Sole Executor of J. Sibley, Deceased.

"DARIUS PERRIN,

"And as survivor of H. J. Perrin & Co.

"H. J. PERRIN & Co"

He also caused the fictitious checks, one for $10,000, and the other for $80,000, the first purporting to be signed by J. Sibley, and the other by H. J. Perrin & Co., to be drawn on the Bank of Michigan, claimed to have been given for stock, and caused them to be allowed before the commissioners on the Sibley estate.

The National Bank of Michigan was but a reorganiza-

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tion of the Bank of Michigan. H. J. Perrin was the owner of all its stock. A few shares were in the name of others. The bonds transferred to the Bank of Michigan could not, however, be used as security for its circulation, as it was an organization under the federal statute. Therefore H. J. Perrin, as president, and said William Powell, as cashier, executed the following instruments:

"WHEREAS, the comptroller of the currency refuses to allow this bank to hold bonds and mortgages as a part of its assets; and whereas there is a large balance due H. J. Perrin from the bank sufficient to pay for said mortgages: Now, in consideration of the sum of one hundred and forty-five thousand one hundred and eighty-one dollars and forty-two cents ($145,181.42), we hereby sell, assign, transfer, and set over the mortgages and accompanying papers as set forth in this sheet; that being the amount of principal and interest due, and to grow due, on the same to this date, April 1, 1866. And we hereby guarantee the same shall be paid, with principal and interest.

H. J. PERRIN, Pt.
"W. POWELL, Cas.

"This list of mortgages having been heretofore duly assigned by the firm of H. J. Perrin & Co. to the Bank of Michigan, we do, for a valuable consideration, hereby affirm and ratify said assignment, and consent to the foregoing assignment and the transfer of the same to H. J. Perrin, and we do hereby assign, transfer, and set over to said H. J. Perrin all interest we have in said mortgages, and guarantee to him the payment of the amount due thereon.

"H. J. PERRIN & Co.,
"By Darius Perrin.
"DARIUS PERRIN, Surviving Partner."

These mortgages, thus assigned, include those belonging to the firm of H. J. Perrin & Co. at the time of Sibley's death, and those which belonged to Sibley individually, so far as they remained unpaid, together with a few mortgages which had since been acquired. What was done with the other assets does not appear, but defendants aver that they all found their way, so far as they can be traced, upon the partnership books as balances, and in that shape went into the Bank of Michigan, and through it to the National Bank or to H. J. Perrin.

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Defendants in their answer further say that it was by this kind of shifts that H. J. Perrin sought to absorb the estate that it was his duty to protect and defend; and further say that in 1868 H. J. Perrin commenced the destruction and secretion of the evidence by which this absorption might be shown; that he did this by transferring from the books of the Bank of Michigan to a private ledger and journal such items and accounts as he wished to preserve, in such form as would conceal as far as possible his fraudulent dealings with the partnership assets, but that this was not successfully accomplished; that having secured the transfers he wished, nearly every other book and paper containing original evidence of the transactions of the Bank of Michigan, of H. J. Perrin, whether individually or as surviving partner, or as executor, between October 19, 1864, and January 1, 1866, have been suppressed or destroyed; that all of H. J. Perrin's dealings with the partnership property and interest of Joseph Sibley were fraudulent and void.

Attention is then called to his dealings with the copartnership real estate, as far as they appear; and the defendants aver that it was collusive and fraudulent, and had with the fraudulent intent to deprive the estate of Joseph Sibley of its interest therein, treating each item separately, and showing, as they claim, the means by which it was attempted to be done.

They further deny the correctness of each and all the schedules attached to complainant's bill, and aver that no account can be made from the books and papers which have yet come to light or been referred to, by which a correct account can be made up, and that made and presented by complainant and his accountants is clearly wrong, and is so erroneous and fraudulent in its plan and structure, and so false and fraudulent in its details, so far as any are stated, that it cannot be made the subject

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of judicial investigation; and they aver that, by reason of the suppression and destruction of the partnership papers and the books of the Bank of Michigan, the destruction of inventories, and many other important papers and books, and by reason of the fraudulent entries made by H. J. Perrin in those which now exist, no reliable *data* now exists for making a surviving partnership account which will approximate, even in a remote degree, to accuracy.

Defendants further aver, however, that the *data* do exist for ascertaining, with reasonable certainty, what principal, interest, and shares were received by H. J. Perrin & Co. during the existence of the firm, or by H. J. Perrin, either in his own name or in the name of the Bank of Michigan, or of the National Bank of Michigan, on the various securities put into the firm by Joseph Sibley as capital, and such as were afterwards taken in renewal, or in lieu of some of them; and they further aver that the complainant's bill does not contain a true statement of the liabilities of the firm paid by Perrin after Sibley's death, nor a correct statement, as near as complainant could make, of the moneys received by Horace from the assets of the firm, nor does it contain, in effect, a true and correct statement of the results of the administration of the affairs of H. J. Perrin & Co.

The defendants deny that there is due to the Perrin estate $35,000 on the tenant in common property account, but aver that a larger sum is due the estate of Sibley on that account; that H. J. Perrin, as executor from 1864 to 1880, insured and leased the undivided half of the tenant in common property, and received the rents and insurance therefrom as such executor; that no books of original entry containing these accounts have been produced or found, and no true account in respect to the common property can now be made up; that the accounts

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rendered by Horace to the judge of probate, during his life-time, of the estate of Joseph Sibley, are erroneous and fraudulent, and cannot be dealt with by the court without being wholly reconstructed; that they contain no account of the proceeds or income of the bonds and mortgages belonging to the Sibley estate after September 10, 1864, and assign as a reason that they were then transferred to the Bank of Michigan for the purpose of raising money to pay the widow's legacy; that such purpose was a sham, made for the purpose of avoiding an accounting for the income, and that such pretense was fraudulent and untrue.

And defendants attached to their answer a supplementary inventory of the individual estate of Joseph Sibley, correcting errors and supplying omissions in the inventory filed with the judge of probate. They also annex a true account of Perrin's administration of the individual estate of Sibley other than the tenant in common property, except they have not charged interest on balances which they claim should be allowed; and defendant Lepper avers that there are no assets in his hands, or to come into his hands, from the Sibley estate, except from the estate of Perrin, with which to pay litigation expenses, and defendant Fisk avers she is almost destitute of the means to pay such expenses.

And both Lepper and Fisk aver, upon information and belief, that Darius Perrin, from the time of the formation of the partnership of H. J. Perrin & Co. until the summer of 1879, was the confidential friend and adviser of H. J. Perrin, and was fully informed of his general purpose to defraud Joseph Sibley while living, and his estate after his death, and to a great extent as to the means to accomplish that purpose, and that he aided and abetted in all the ways he could to accomplish the result finally reached, whereby Horace assumed the

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ownership of all the Sibley estate, and, before the heir reached the age of 26 years, he was informed his patrimony had been swallowed up in the management and settlement of the estate, which was then found to be insolvent.

Defendants further aver that it was largely through the influence of Darius Perrin that Francis M. Sibley was induced to execute instrument No. 1, herein referred to; that, to aid in defrauding Francis, Darius fraudulently pretended to have advanced $31,000 for improvements upon the tenant in common property, and have a lien upon the income thereof for that amount, under instruments Nos. 2 and 3, herein referred to; that he fraudulently pretended to be a partner in the firm of H. J. Perrin & Co., and, as such, to be the owner of one undivided one-third of the real estate and other assets of the company; that he aided Horace in the secretion of books and papers, concerning the assets and affairs of the firm; that he claimed and pretended to be one of the surviving partners of the firm, and as such joined Horace in the fraudulent transfer to the Bank of Michigan of bonds and mortgages which were firm assets, and fraudulently assented to the pretended assignment of them by the National Bank of Michigan to H. J. Perrin, when he knew they were the assets of H. J. Perrin & Co., and of the estate of Joseph Sibley; that he advised, counseled, and aided in transferring title of the copartnership real estate to his daughter Caroline E. Perrin; and finally denied, under oath, in his answer to Mrs. Fisk's bill hereinbefore referred to, upon his information and belief, that the firm made any profits, when he knew and had good reason to believe to the contrary; and they claim for their answer the benefit of a cross-bill.

Such are the more important portions of the answers

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of defendants Lepper and Fisk; their prayer reading as follows:

"1. These defendants, as well as the complainant, pray for a full and complete accounting and settlement in regard to Horace J. Perrin's administration of Joseph Sibley's estate, including an accounting and settlement in respect to the copartnership affairs of H. J. Perrin & Co., and the dealings of Horace J. Perrin, as executor or otherwise, with the property owned by Horace J. Perrin and Joseph Sibley as tenants in common.

"2. They pray that this court may inquire into such matters as may be necessary for that purpose, and determine, by a preliminary decree, the principles upon which such accounting shall proceed. Thus they pray, among other things:

"*First.* That this court may decree that the report of the commissioners on claims against Joseph Sibley's estate is wholly void, because

"1. It appears therefrom that notices of the meetings of the commissioners were not posted in the manner required by law, and by the warrant to the commissioners.

"2. Because such notices were not in fact posted.

"3. Or, if not wholly void on these grounds, that as to the claim appearing to have been allowed subsequent to that in favor of Manlius Mann, the report be set aside and declared void on other grounds, stated in paragraphs 86 to 96 of this answer, and that all charges in the executor's account for the payment of any of these claims be disallowed.

"*Second.* That this court may decree that the purchase by Joseph Sibley from Horace J. Perrin of an undivided one-half of the Kalamazoo river mill property, for $65,000, was made in November, 1863, or later, and that it embraced an undivided half of all flowage rights appurtenant to the property which Horace J. Perrin then owned; but that, for the purpose of defrauding Joseph Sibley of his estate in respect to the right of flowage, Horace J. Perrin either caused his conveyance of the property in consummation of this purchase to be antedated to December 6, 1861, or fraudulently altered the date after the execution and delivery of the deed, and before its registry.

"*Third.* That this court may decree that the deed of Joseph Sibley and wife to Horace J. Perrin, of April 2, 1864, if any such deed was executed, was wholly without consideration; that it embraced, as recorded, nearly all rights of flowage appurtenant to the mill property, an undivided half of which Joseph Sibley had purchased from Horace J. Perrin in the previous November for $65,000; that the Calhoun and Montcalm county lands described in it, as recorded (except flowage rights vested in Joseph Sibley by the before-mentioned deed of the mill property), were partnership properties; that the lands in Marengo were all more or less flowed

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by the dam of the Kalamazoo river mill property; and that either—

"1. No such deed was ever executed; or,

"2. As executed it did not embrace the Calhoun or Montcalm county lands, but that the descriptions of them were fraudulently inserted by Horace J. Perrin, or by his procurement, after Joseph Sibley's decease, and before registry in Calhoun county; or,

"3. That as to these lands the conveyance of them was in trust for the firm; and that in 1866 Horace J. Perrin placed this deed, or pretended deed, on record, and fraudulently claimed the ownership of these lands, divested of any trust, and subsequently fraudulently conveyed the same to, or caused the title thereof to be in some other way vested in, third parties.

"*Fourth.* That this court may decree that the execution of instruments number one, two, three, four, referred to in the (25th) paragraph of the amended bill, and the 98th paragraph of this answer and of instruments numbered five and six, referred to in the (27th) paragraph of the amended bill, and the (99) paragraph of this answer, all relating to improvements upon the Kalamazoo river mill property, so far as they were executed by Francis M. Sibley, was procured by fraud and undue influence, and that the same be set aside and declared void.

"*Fifth.* That Horace J. Perrin's estate, if entitled to make any charge in this executor or tenant in common account, for improvements, other than reasonable or necessary repairs upon the mill property, those charges must be limited to the actual benefits received by J. Sibley's estate in the way of increased rents and insurance money, in no case exceeding the actual costs of the improvements.

"*Sixth.* That the accounts rendered in schedules G, H, and I, annexed to the amended bill of complaint, of the rents and income and insurance moneys received for losses by fire upon the mill property, and of the expenditures thereon, are not only false and fraudulent, but too insufficient and confused to be made the basis of judicial investigation, except for the purpose of determining their character.

"*Seventh.* And that the books and papers containing the *data* for making a just or true account of H. J. Perrin's dealings with this property have been to such an extent fraudulently secreted or destroyed by Horace J. Perrin or his representatives as to render the making up of such an account impossible.

"*Eighth.* That in view of the fraudulent and wrongful acts of Horace J. Perrin, whereby clouds upon and embarrassments of the title of the undivided half of the property, and rights of flowage appurtenant thereto, have been created, and the difficulty of estimating the damage caused thereby, and his other fraudulent dealings with the property, and failure to render true accounts in respect to it, and his secretion or destruction of the *data* from

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which such an account can be made, it may be decreed that, if these defendants so elect, on the execution by them of a proper quitclaim and release of all interest in this mill property, and the income thereof, and insurance moneys received for losses by fire thereon, and accounting for such rents as they, or either of them, may have received therefrom since H. J. Perrin's decease, it shall be a full satisfaction of all claims against J. Sibley's estate for the $65,000 of purchase money for the undivided half of the property; and the accounts of Horace J. Perrin's administration, as executor and surviving partner, shall be adjudged upon the same basis as if Joseph Sibley had never purchased or owned an undivided half of the mill property.

"*Ninth.* Or, if this relief is not granted, these defendants pray that it may be decreed that, in the accounting in respect to the property, Horace J. Perrin's estate shall be charged with all damages caused by his fraudulent embarrassments of the title of J. Sibley, or those claiming through him, to an undivided half of the property; and by his wrongful withholding of the possession, and suffering the property to go to decay and decline in value, that, when clear, detailed accounts of the rents received are not rendered, H. J. Perrin's estate shall be charged with the highest rents which it may be shown the property was capable of earning, and shall be credited for repairs and improvements in no case more than they are shown by clear and satisfactory evidence to have cost, nor beyond the benefits which J. Sibley's estate derived therefrom.

"*Tenth.* Or that the court decree on what other principles the accounting in respect to this property shall proceed.

"*Eleventh.* These defendants pray that this court may decree that no bonds and mortgages or other assets of Joseph Sibley's estate were ever in fact transferred to the Bank of Michigan, or, if any were transferred, that the transfer was fraudulent and void, and that Horace J. Perrin's estate is bound to account for the income and profits of all such bonds and mortgages or other assets claimed to have been transferred.

"*Twelfth.* That this court may decree that the executor's account rendered in schedule of the amended bill is too confused, false, and fraudulent to be made the basis of a judicial investigation of this account, and the account rendered in schedule annexed to this answer be substituted in its place for that purpose.

"*Thirteenth.* These defendants pray that this court may decree that the stock, capital, and assets of the Bank of Michigan, in whosesoever names the stock stood, belonged exclusively to H. J. Perrin & Co.; that the National Bank of Michigan was a mere reorganization of the Bank of Michigan, and its stock, capital, and assets were in equity also assets of H. J. Perrin & Co.; and that all

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transfers by H. J. Perrin, as surviving partner or executor, or of H. J. Perrin and Darius Perrin as surviving partners, of bonds and mortgages or other assets of H. J. Perrin & Co., to either of these banks, were not only fraudulent, but absolutely null and void; and that Horace J. Perrin's estate is bound to account for the income and proceeds of such bonds and mortgages, and other assets, as if no such transfers had ever been made.

"*Fourteenth.* That this court may decree that the surviving partner accounts annexed to the amended bill are wholly insufficient, false, and fraudulent, and that, in consequence of the fraudulent acts and omissions of Horace J. Perrin, no reliable *data* exist for making and stating such accounts, or for ascertaining with reasonable certainty the state of the affairs of H. J. Perrin & Co. at the time of Joseph Sibley's decease, or what would have been the result of the copartnership business if it had been properly wound up by Horace J. Perrin as surviving partner, though it does appear sufficiently that it would have resulted, and did in fact result, in large profits; the amount of which profits is unascertainable, and any attempt to ascertain the same would involve unreasonable and useless delay and expense; that in view of this state of things, and of the provisions of the copartnership articles, this court may decree an accounting to ascertain what capital was put into the firm by Joseph Sibley in bonds and mortgages, or other securities or money, and what interest or income was derived from the bonds and mortgages or other securities so put in, or from the securities which may from time to time have been substituted for any of them; and that in the accounting Horace J. Perrin's estate, or the complainant as its representative, be charged with the amount of such securities so contributed, and the interest and income thereof, and of any such substituted securities, and also with interest at the rate of ten per cent., compounded on any cash capital so contributed by Joseph Sibley, and the proceeds of such securities after the same have ceased to be capable of identification; and that the surviving partner account be adjusted on this basis.

"8. These defendants also pray that a receiver may be appointed by this court to take possession and charge of all the property and assets of Horace J. Perrin and of H. J. Perrin & Co., and of all books and papers relating thereto.

"4. And that such receiver be directed to pay out of such property and assets, or the income thereof, all the reasonable expenses of the accountings prayed for by the amended bill, and in this answer, which have been or may be incurred by the respective parties to such accounting, the accounts for such expenses to be audited as this court shall direct.

"5. And that these defendants may have such other and further

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relief in the premises as the circumstances may require, and to this honorable court may seem meet.

"ANNA LOUISA FISK.
"S. V. R. LEPPER,
"Administrator, etc."

Darius Perrin filed his separate answer, wherein he says he was a partner with Sibley and Horace until Sibley died, and indorsed their paper for large sums of money, and assisted the firm by his personal service much of the time; that Mann, Powell, Dibble, and Frink, the persons appointed executors with H. J. Perrin by Sibley of his will, declined to accept the trust or qualify, and that their declination was procured by H. J. Perrin, so that he could alone administer the estate under the will.

He avers that H. J. Perrin's conveyances of land to his daughter Caroline are valid, and that she intends to hold the land; that Joel J. Perrin, administrator, has entirely withheld from him the books and papers of the firm; has refused to allow him to inspect them since the death of Horace.

Denies, upon information and belief, that Horace put into the firm, as capital when it was formed, over $40,000. Avers a profit was made in the company business, and no great loss was sustained in any portion thereof.

He further avers that himself and Horace carried on the business in which the firm was engaged, the same after as before Sibley died, as surviving partners, but that Horace had all the management of the business; that all the books and papers of the firm were in Horace's hands when Sibley died, and were afterwards kept under his exclusive direction and control, and he managed and manipulated the keeping of said books and accounts, and the entries made therein, as he saw fit, and defendant could not get him to render an account of the assets and liabilities of said firm at any time.

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The defendant avers that the business of the partnership was in a flourishing condition, and making money, —accumulated large profits in the business; and that Horace continued to make statements to that effect to the defendant, until Francis M. Sibley filed his bill against Horace for an accounting, and to obtain his father's estate, and then he proclaimed the firm insolvent to Francis and others, and which was not true, and, as he avers, Horace commenced about that time his fraudulent practices of various kinds to appropriate the firm assets to his own use. And further says the Bank of Michigan was owned by the firm, and that its books contained numerous transactions of the firm from time to time, relating to its other business as well as that of the bank; that he never, to his knowledge, joined in the transfers of the firm property to the Bank of Michigan, or to the National Bank of Michigan; that all such transfers are void, and were procured by Horace J. Perrin.

He denies that the firm at any time owed $700,000, or any sum, over and above its bills and accounts receivable, and if the books show such a state of things at any time it is because of false and fraudulent entries made therein, or caused to be made, by H. J. Perrin in his life-time.

He denies that any of the schedules attached to the complainant's amended bill are correct or truthful, and he believes his share of the profits of said firm will, upon a fair and honest accounting, amount to $50,000; and further denies that the firm is indebted to H. J. Perrin's estate.

Darius Perrin, further answering, says that, during the continuance of said firm, H. J. Perrin had the principal charge and management of its business operations, and of the keeping of the accounts, and that no business of importance was transacted without his knowledge, con-

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sent, and approval, and that said Horace, in the life-time of Sibley, and for several years thereafter, frequently and at all times informed him the firm made large profits, and never told him otherwise, until Horace conceived the idea of defrauding the Sibley estate of its portion of the assets of the firm, and the profits thereof, and to that end he—

"Manipulated the keeping of the accounts of said copartnership after the death of said Joseph Sibley,"—

And fraudulently attempted to appropriate all the assets to his own use, to defraud him and the Sibley estate; that he not only made false and fraudulent entries upon the books of account, but intermingled the assets of the firm with the individual assets of Joseph Sibley's estate, also, by the destruction and concealment of books of account and papers belonging to and relating to the business of the firm, and by the fraudulent mutilation of such books and papers, and by fraudulent changes of dates, items, and amounts; and for the ways and means of accomplishing such fraudulent purpose and design he refers to those given in Lepper's and Mrs. Fisk's answer in this case; and, so far as they relate to the fraudulent entries upon the books of account of said firm, or of matters relating to the assets of the firm, upon information and belief he charges the same to be true, and that no separate accounts of Sibley's assets, or the company's assets, or of H. J. Perrin's, or of his and Horace's assets, was ever kept, but that they were all kept and commingled together, and he is informed and believes that no inventory was ever made or kept showing the individual property and that of the company, and that no attempt was ever made to make such accounts, or an inventory by Perrin or his administrator, until the filing of the bill in this case.

Further answering, he says the Bank of Michigan

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belonged to H. J. Perrin & Co.; that its books contained numerous entries of the transactions of the firm from time to time, and of other matters, as well as those relating to the transactions of the bank; that he is denied all access to the books of the Bank of Michigan; and he avers that all the transfers of the property of the firm to the Bank of Michigan, or to the National Bank of Michigan, were without consideration, and were procured by H. J. Perrin to cheat and defraud the defendant and estate of Joseph Sibley, and that he had no recollection of ever participating in any such transfers, that the National Bank of Michigan was but the successor of the Bank of Michigan, and that its bonds were purchased by Horace with the property of the firm, and he held its assets in trust for the firm when he died; that its stock, in whosesoever name it stood, was all owned by Perrin, and he received the income from the same; that the books of the Bank of Michigan were not burned, but suppressed, and that he saw them, and saw H. J. Perrin examine them, since the fire.

He further says they contained much information about the company's business which is not obtainable from any other source; that, as surviving partner, he has asked J. J. Perrin, Horace's administrator, for the books of the firm and the bank, but he refuses to allow defendant to take or inspect them.

This defendant prays the benefit of a cross-bill from his answer, and for an accounting, and that his interest may be ascertained and paid, and for a receiver, and for general relief.

Caroline Perrin answered the amended bill, and therein denies that Horace was the owner of certain lands at the time of Joseph Sibley's death, and which were deeded to her by Horace, and also denies that Horace was ever mentally incompetent to do business, and states that a

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suit is now pending in the federal court, at Detroit, between the heirs of Horace J. Perrin, as the complainants, and defendant, to test the validity of her deed, upon the ground of alleged incapacity of Horace, and fraud, and undue influence.

Says J. J. Perrin, as administrator, has colluded with the other heirs of Horace, and has destroyed an unrecorded deed made to her by Horace. She also denies that the firm at Sibley's death held the title to, or were the owners of, any real estate deeded to her.

She denies that Horace or Joel acquired any title to any of the lands by foreclosure of mortgages after Sibley's death, and avers that all proceedings had for that purpose were fraudulent and void; and she further claims that, as to the matter of accounting and settlement of the affairs of the firm of H. J. Perrin & Co., or of H. J. Perrin's executorship of the estate of Joseph Sibley, or with the assets of the Sibley estate, they are matters relating to which the defendant ought not to be joined with the defendants in this suit; and claims the benefit of a demurrer for that cause, as well as for multifariousness; that no case is made against her in the bill. She denies all fraud and confederacy, and asks that the bill may be dismissed as to her.

Elizabeth C. Perrin made her separate answer, and says that she is informed and believes Horace J. Perrin foreclosed the mortgage against L. C. Kellogg, and took a decree for $25,000, and sold the property thereon, and bid it off in her name at the sale for about $6,000, and had the deed made to defendant about August 26, 1878; that she paid nothing on the bid, and knew nothing of the transaction at the time. She further says, on the 26th of December, 1878, she gave a mortgage for $12,000 to Horace, at his request, running to the firm of H. J. Perrin & Co.; that said mortgage was not intended to create

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any indebtedness of hers, and should be delivered up and canceled, and that she is ready to receive the same, and convey the property to whomsoever it may belong; and, as to anything else contained in the bill, she is not interested, and is a stranger thereto, and should not be required to answer, and ought not to have been joined as defendant, and claims a demurrer.

She prays the benefit of a cross-bill, and by decree she may be directed to convey the Kellogg property to such persons as the court shall find entitled to the same; and that she may be released from all liability if any on account of giving said mortgage, and note accompanying the same.

She denies all confederacy and fraud with which she is charged, and asks to be dismissed, with her reasonable charges.

The Sibley heirs to the number of 42, filed their joint and several answer, on the 21st day of May, 1885. They in substance affirm that the Lepper and Fisk answer is true, and aver, upon information and belief, that J. Sibley's capital at the time of his death, in the firm of H. J. Perrin & Co., was the sum of $250,000; that Darius was never a partner, nor had he any interest in said firm, and that his claim now put forth as such partner is only for the purpose of defrauding and assisting Horace J. Perrin's estate in defrauding the estate of Sibley, and absorbing its property; and that all the schedules attached to complainant's amended bill are incorrect, false, and fraudulent.

In view of what has already been said, it will be unnecessary to notice further the case of these Sibley heirs. After this, the issue was joined by the filing of the usual replication to these several answers.

On filing the answer of Lepper and Fisk, and on the 1st day of April, 1884, they applied to the circuit judge

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for the appointment of a receiver. Darius Perrin also made a similar application June 2, 1884. The circuit judge, on the 3d day of September, 1884, decided that a receiver be appointed, and on the 9th day of October made the following order appointing John Houston, of Marshall, in the county of Calhoun, such receiver:

"This cause having been brought on for hearing upon the joint motion of the defendants Stephen V. R. Lepper, administrator of the unadministered estate of Joseph Sibley, deceased, and Anna Louisa Fisk, individually and as executrix of Francis M. Sibley, deceased, and the separate motion of the defendant Darius Perrin, for the appointment of a receiver of the property and assets of the late firm of H. J. Perrin & Co., and of Horace J. Perrin, deceased, and having been heard upon the pleadings, affidavits, books of account, and other documentary evidence adduced by the respective parties, and having been argued by the respective counsel for the complainant, and the moving defendants, and their arguments having been duly considered.

"And it appearing to the court, amongst other things, that October 11, 1858, Horace J. Perrin and Joseph Sibley entered into copartnership under the name of H. J. Perrin & Co., upon the terms alleged in the first paragraph of the complainant's amended bill; that the defendant Darius Perrin, on April 30, 1859, became a partner in said firm; that this firm continued to exist, and to do a large and apparently successful business, until September 7, 1864, when it was dissolved by the death of Joseph Sibley.

"That on Joseph Sibley's decease Horace J. Perrin, as surviving partner, assumed the control and management of the partnership affairs, and took possession of the partnership property and assets, and its books and papers; that soon afterwards he was appointed executor of Joseph Sibley's estate, and in that capacity took possession and control of the individual property and assets of that estate, and its books and papers; that he did not proceed with due diligence to wind up the partnership affairs, and complete the administration of Joseph Sibley's estate, but neglected and refused to do so for sixteen years and upwards; that he made no inventory of the property and assets which came into his hands as surviving partner, and kept no proper surviving partner or executor account, or, if so, they have not been produced.

"That he continued, after the decease of Joseph Sibley, to carry on business with the partnership property and assets, and to some extent the individual assets of Joseph Sibley's estate, and the income and proceeds thereof, either in the name of H. J. Perrin & Co., or

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in the name of the Bank of Michigan,—an institution organized by H. J. Perrin & Co., under the general banking law of Michigan, and which was owned by and an asset of the firm,—or in the name of the National Bank of Michigan, which was the Bank of Michigan reorganized under the general banking law of the United States, or in his own name, until his decease.

"And after a time on various false pretenses, and by and through various fraudulent devices, he acquired, or claimed to have acquired, a color of title to a large share of the said assets, and fraudulently claimed and dealt with them as his own, discharged of the trusts upon which he held them as surviving partner and executor, and so dealt with them, and changed their form, and commingled them with his own property, that apparently they have for the most part become incapable of specific identification.

"That Horace J. Perrin died on January 11, 1880, without having wound up the partnership affairs, or accounted, either as surviving partner or executor, or ever rendered any clear or intelligible account of his doings in either capacity.

"That soon after Horace J. Perrin's decease the complainant was appointed administrator of his estate, and the defendant Lepper administrator *de bonis non* of the estate of Joseph Sibley; that the complainant, as such administrator as aforesaid, came into the possession and control of the personal estate of which Horace J. Perrin died possessed, and his books and papers, and the books and papers of H. J. Perrin & Co., and of Joseph Sibley, and the other books and papers containing information in respect to Horace J. Perrin's dealings with the property and assets of H. J. Perrin & Co., and of Joseph Sibley's estate; that the property and assets of which he so came into the possession included a large amount of the assets of H. J. Perrin & Co., and of Joseph Sibley's estate, or the income and proceeds thereof, commingled with Horace J. Perrin's own property in the manner before stated.

"That the complainant is one of the heirs at law of Horace J. Perrin, and as such his interests are adverse to the claims of the moving defendants; that he has not used due diligence in ascertaining, from books and papers in his possession and control as administrator, the facts in relation to Horace J. Perrin's administration of the affairs of H. J. Perrin & Co. and of Joseph Sibley's estate, and rendering clear and intelligible accounts thereof; that in and by his amended bill in this cause, and the accounts annexed thereto, he has claimed the benefit of, for his intestate's estate, most of the devices by which his intestate sought to appropriate assets of H. J. Perrin & Co. and of J. Sibley's estate, as hereinbefore mentioned; that the accounts of Horace J. Perrin's administration of the affairs of H. J. Perrin & Co., and those of Joseph Sibley's estate, annexed to the

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complainant's amended bill, are so obscure, defective in method, deficient in detail, and so erroneous, as to be unfit basis for judicial investigation; that the complainant has denied to the defendant Darius Perrin all access to the books and papers of such firm; that the books and papers of the Bank of Michigan, which contained the only original record known to have been made of the dealings of Horace J. Perrin, with most of the property and assets of H. J. Perrin & Co., and of Joseph Sibley's estate, between October 19, 1864, and January 1, 1866, are not produced; that the private ledger of Horace J. Perrin, covering the period prior to 1870, containing like records, was not produced for the inspection of the defendants Lepper and Fisk until after great delay, not satisfactorily explained, and before its production had been in various parts fraudulently mutilated by Horace J. Perrin, or some other person.

"It is now, by the court, ordered, adjudged, and decreed that John Houston, of Marshall, Calhoun county, Mich., be, and he is hereby, appointed receiver of all the property and assets now remaining, and capable of identification, which belonged to the late firm of H. J. Perrin & Co., or to the estate of Joseph Sibley, deceased, and also all the personal property and assets of the estate of Horace J. Perrin, deceased; that said John Houston file security in the usual form in such cases, with sureties to be approved by the judge or register of this court, upon a motion of six days, with names of sureties proposed, and in the penal sum of three hundred thousand dollars, for the faithful performance of his trust, and upon the filing of such security in the office of the register of this court such receiver will have all the powers and authority of receivers in like cases; that said complainant assign and deliver over to such receiver, under the direction of one of the circuit court commissioners of this county, to whom it is referred, all the property and assets of the firm of H. J. Perrin & Co., or of the estate of Joseph Sibley, deceased, or which belonged to said firm, or to said Joseph Sibley, at the time of said Joseph Sibley's decease, and all books and papers belonging to said firm, or to Joseph Sibley's estate; also all other books and papers containing any information in respect to Horace J. Perrin's dealings with the property or assets, and the liabilities of said firm, or of said estate of Joseph Sibley; also all the assets of the estate of Horace J. Perrin, and all books and papers belonging to his estate, so far as the aforesaid property, assets, books, and papers have come into his possession or under his control; and that he appear before said commissioner from time to time, and submit to examination on oath in relation to any such property, assets, books, or papers, and the assignment and delivery thereof to such receiver, according to the rules and practice of the court; and it is further ordered that either of the parties hereto, as well as said receiver, have leave to apply to

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this court for such further and other directions in the premises as may from time to time seem advisable and necessary.

"FRANK A. HOOKER,
"Circuit Judge."

From this order the administrator of H. J. Perrin's estate took an appeal to the Supreme Court, where the order of appointment made by the circuit judge was so modified and restricted in its application as not to apply to any part of the property claimed as belonging to the estate of Horace J. Perrin. This modification was made April 15, 1885. See *Perrin v. Lepper*, 56 Mich. 351 (23 N. W. Rep. 39).

On the 29th day of January, 1886, the circuit judge made the following order:

"In this cause, on reading and filing motion of the complainant, and for a general reference to a commissioner to take proofs in this cause, and on due consideration thereof, and of the cross-examination of the defendants Lepper and Fisk, duly entered herein, for a hearing in open court the preliminary questions of fact necessary to be determined to fix the principles of the several accountings, such preliminary questions to be recited in the order for such hearing; and on motion of M. J. Smiley, solicitor for complainant, Wm. H. Porter, solicitor for defendant Lepper, and S. T. Douglass, solicitor for defendant Fisk, opposing said order, but consenting that, if entered, George Gatrell, a notary public, may be substituted in such order for any circuit court commissioner; and further consenting to so much of said order as relates to the enlargement of the time,—ordered that it be referred to said George Gatrell to take proof, and report the same to this court, relating to the matters in controversy between the parties necessary or proper to be determined for the purpose of ascertaining and determining the principles upon which the accountings in this cause, or any of them, shall proceed.

"That the time for taking such testimony shall be limited to ninety days from date hereof, and may be enlarged either by the court, or the judge at chambers on cause shown, or the application of either of the parties, with a bond that, upon the filing of the proofs taken by the commissioner, either party may notice the cause for hearing for the purpose of obtaining a preliminary decree as to the principles for such accounting.

"FRANK A. HOOKER, Circuit Judge."

Under this order, all the proofs in the case have been

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taken, and which number nine or ten thousand pages, and upon which, and the pleadings, the cause was heard before Judge Hooker, in the Calhoun circuit, who, on the 7th day of October, 1887, entered the following decree:

"Decree in case of Joel J. Perrin, Administrator, etc., v. S. V. R. Lepper, Administrator of the Unadministered Estate of Joseph Sibley, Deceased, et al.

"That Horace J. Perrin and Joseph Sibley, on October 11, 1858, became partners under the articles of copartnership set forth in the amended bill of complaint in this cause; that on April 30, 1859, in accordance with the provisions of the eighth of said articles, Darius Perrin was admitted to the said partnership, and that on said 30th of April, 1859, said H. J. Perrin and Joseph Sibley executed the agreement, admitting said Darius to said partnership, set forth in said amended bill, and that thereafter said Darius Perrin continued to be a member of said firm until the dissolution thereof; that on July 31, 1861, said copartnership was renewed by an agreement in writing, signed by said H. J. Perrin and Joseph Sibley, as alleged in said amended bill of complaint, and assented to by Darius Perrin, although not signed by him; that Joseph Sibley contributed to the capital stock of said firm the securities described and set forth in Schedule E, attached to said amended bill; that Joseph Sibley died September 7, 1864, and said firm thereby became dissolved; that said Joseph Sibley executed the last will and testament and codicil, described and set forth in said amended bill; that the same was duly admitted to probate as therein alleged, and that of the executors named therein H. J. Perrin alone qualified, and became sole executor thereof; that as to the residuary portion of his estate said Joseph Sibley died intestate, and such residuary portion became vested in Francis M. Sibley, and that his title thereto was never divested under the fourth clause of said will.

"That no portion of said estate ever became vested in any of the defendants known as the Sibley heirs, to wit, Orrin Sibley, Maria Drake, Mary Churchill, Hannah Field, Adalade Sill, Clark C. Sibley, Pattie Hare Newcomb, Marriett Smith, Wakeman Sibley, Phillip Sibley, James R. Sibley, Jane Sibley Smith, Ella P. Bork, Bushnell B. Carr, Amanda Crocker, Anna P. Cummings, Mary Sophia Hulett, Henry C. Ramsdell, Mary E. Vilas, Jonathan Sibley, Frank Sibley, Mary Ann Prenttice, Juliet Gardinier, Chas. Sibley, Clark C. B. Sibley, Frank Shadbolt, Henry Shadbolt, George Shadbolt, Mollie Shadbolt, Julia Drummond, Lucian Sibley, Joseph C. Sibley, Henry Sibley, Mrs. Chas. Miller, Mrs. E. F. Crane, Margira Sibley, Wm. A. Sibley, Irving Sibley, Amelia Waite, Austin Agard, and John Sibley.

"That Francis M. Sibley died November 30, 1870, having devised and bequeathed his entire estate to the defendant Anna Louisa Sib-

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ley, now Anna Louisa Fisk; that defendant Lepper is the duly qualified administrator of the unadministered portion of Joseph Sibley's estate; that upon the dissolution of the firm of H. J. Perrin & Co. by the death of Joseph Sibley, on September 7, 1864, all of the accounts and other assets and property of said firm came into the possession and control of H. J. Perrin as surviving partner; that during his lifetime the said H. J. Perrin neither kept nor rendered to Francis M. Sibley, nor to any representative of the Sibley estate, nor to any person entitled thereto, any true or honest account of his dealings with the assets and property aforesaid, as surviving partner, but willfully and fraudulently refused and neglected so to do, and was otherwise guilty of gross fraud and misconduct in his capacity as trustee, both as surviving partner and executor; that said H. J. Perrin died January 11, 1880, and that the complainant was afterwards duly appointed administrator of his estate, as set forth in the amended bill; that none of the schedules attached to complainant's amended bill contain a true account of H. J. Perrin's doings as surviving partner, and the same are not a proper basis for an accounting: that no true account of H. J. Perrin's doings as surviving partner has been furnished to defendants Lepper and Fisk, or either of them, or to any person interested in said Sibley's estate, by the complainant, Joel J. Perrin.

"That after the dissolution of said firm of H. J. Perrin & Co., by the death of Joseph Sibley, on September 7, 1864, and down to October 19, 1864, said H. J. Perrin continued to carry on the business of said firm as before the dissolution, and kept and recorded his doings in that regard on the firm's books; that on October 19, 1864, said H. J. Perrin, by sundry devices and means, attempted to conceal and convert to his own use the assets of said firm, and after said October 19, 1864, said H. J. Perrin did convert to his own use the assets of said firm, the proceeds and income and profits thereof, and did traffic therewith, and make large gains and profits therewith: and, because of H. J. Perrin's fraud and misconduct, it is now impossible to ascertain with accuracy the value of said assets or profits made therewith, or the increase thereof, but that such assets earned large profits in the hands of H. J. Perrin.

"And thereupon the court orders, adjudges, and decrees that the administrator of said H. J. Perrin's estate, said Joel J. Perrin, do account to the said S. V. R. Lepper, administrator of Joseph Sibley, for the value of Joseph Sibley's interest in the firm of H. J. Perrin & Co., as of October 19, 1864, and that such value be determined as hereinafter directed.

"And it is further adjudged and decreed that the several agreements executed by Francis M. Sibley, with reference to the real estate owned in common by Joseph Sibley and H. J. Perrin, set forth in the amended bill, and therein designated as number one, number two, number three, number four, number five, and number six, were

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fraudulently obtained by H. J. Perrin, and are, and each and every one of them is, null and void; that the estate of Joseph Sibley was entitled to receive one-half of the rents, profits, and income of said real estate after said Sibley's death, but that the whole of such rents, income, and profits was received by H. J. Perrin, and that said H. J. Perrin never kept or rendered any true or honest account thereof to Francis M. Sibley, or to any representative of Joseph Sibley's estate, or to any person interested therein; that, if a true account of the same was ever kept, the same has been suppressed or destroyed, and is not produced, and that, by reason of the fraudulent acts by H. J. Perrin aforesaid, no true or accurate account has been or can now be made up.

"Thereupon the court decrees that $80,000 be fixed as the value of Joseph Sibley's interest in said real estate as of the day of his death, September 7, 1864, and that 7 per cent. interest thereon from said September 7, 1864, to January 11, 1880, be fixed as the value of the share of Joseph Sibley's estate in such rents, profits, and income; and that, in addition thereto, the Sibley estate is entitled to one-half of the insurance money received by H. J. Perrin in 1867, on buildings and improvements on said property then destroyed by fire.

"It is further ordered, adjudged, and decreed that an accounting be had of the partnership affairs, and of the value of Joseph Sibley's interest, as well as that of the other partners in the firm, as of October 19, 1864, and of the rents, profits, and income of the tenant in common property, and of the proceeds of the individual estate of Joseph Sibley, received by H. J. Perrin as executor, all in accordance with principles of this decree, and that upon such accounting the parties proceed as follows:

"Each party shall, on or before the 12th day of November next, make up and file with the register a plain statement of the firm's assets and debts as of October 19, 1864, showing all of the assets then owned by the firm, and every item thereof, and the value of each item as nearly as the same can be stated, according to his best information and belief (but such statement shall not include any accounts or claims against either of the partners), and the various items of indebtedness then due and owing by said firm to persons other than partners, and the several amounts actually paid out in discharge of such indebtedness, and when and how paid, as nearly as the same can be stated, according to his best information and belief. Such statement shall exclude all fictitious and merely offsetting assets of debts, and shall be confined to a statement of actual assets and actual debts.

"And each party shall, within the same time, likewise make up and file with the register a plain statement of the account of the firm of H. J. Perrin & Co. with H. J. Perrin, as of October 19, 1864,

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showing all the items proper to be charged or credited to said H. J. Perrin of that date, whether included in the account of said H. J. Perrin on the books, or in any other account on the books or otherwise; and shall within the same time make up and file with the register a like statement, according to his best information and belief, of the proper items of charge and credit, to the account of Joseph Sibley, and of Darius Perrin, of the same date; and shall within the same time make up and file a plain statement, showing all sum and sums and property that came to the hands of H. J. Perrin, either personally or through the Bank of Michigan or National Bank of Michigan, or by complainant, from the assets comprising the individual estate of Joseph Sibley, and all payments and expenditures lawfully incurred by said H. J. Perrin in the administration of said estate, and the value of the same on the 1st day of January, 1866.

"That, at the expiration of such time, it will, if deemed necessary by the court, on application of either party, on notice of ten days, be referred to a commissioner to be then named, to take and report and account as to any and all items on which the parties disagree, and either may offer in evidence, under the direction of the court, and the testimony already taken shall be considered in the decision of all disputed questions, with the same force as if taken again on such accounting. Such application may be made and heard by the judge of said court sitting at chambers, and the order there made shall have the same force and effect as if made at term.

"In making up the statements aforesaid, and in taking the account, the following principles shall govern:

"1. The assets of said firm, and the value thereof, on the 19th day of October, 1864, shall be ascertained.

"2. The debts owing by said firm on that day, to persons other than the partners, should be ascertained, and the amount determined, and which of the same were actually paid; also what, if any, are now valid, outstanding against said firm.

"3. The amount of the capital account of each partner on said day, including simple interest at 7 per cent.

"4. The amount of the $65,000 check should reduce the capital account of Joseph Sibley to the extent that it overdrew his special deposit account.

"5. The difference between the sum of the capital accounts of H. J. Perrin and Joseph Sibley, and the surplus of assets over debts, shall be called profits. Of such profits as were earned by said firm before April 15, 1859 (if any), one-half shall be credited to H. J. Perrin, and one-half shall be credited to Joseph Sibley; of profits subsequently earned, one-third shall be credited to each of the three partners.

"6. The sum of Sibley's capital account, and his share [illegible]x, were

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profits, shall be taken as the value of his interest on said 19th day of October, 1864.

"7. At the time of Sibley's death, said firm was the equitable owner of certain real estate designated in the record as follows, viz.: 'The Tillotson Farm' and 'The Etheridge Lot,' title to which was taken, and then stood in the name of H. J. Perrin & Co.; the 'Tillotson Mill,' the 'Mason Farm,' and the 'Marshall House Property,' title to which was taken, and then stood in the name of H. J. Perrin and Joseph Sibley. The Tillotson farm, was taken, and then stood, subject to a mortgage to one Ramsdell, which mortgage was allowed to be foreclosed subsequent to Sibley's death, and the title taken in the name of Darius Perrin. A portion of the same has since been sold, and the proceeds of such sale should be accounted for, to said firm, by said Darius Perrin, if he has not already done so. The remainder is still held by him, and should be treated as property held in trust for said firm, subject to division, if not required for partnership purposes. The rents and profits should also be accounted for by the person who has received them. The legal title to the Etheridge lot having been conveyed by H. J. Perrin to Caroline E. Perrin by his deed, and the title to the Tillotson mill and Mason farm being vested in her through unnecessary and fraudulent foreclosures without consideration, the Sibley estate should be permitted to exercise the option of requiring a deed from said Caroline E. Perrin of the undivided one-third of said premises, or of treating the conveyances as conversions by said H. J. Perrin at the respective dates of the several conveyances. The effect of the exercise of this right upon the accounting is plain, and need not be further stated. The legal title to the Marshall House property having been taken in the names of Perrin and Sibley, the deed to Caroline E. Perrin was ineffective to pass the half vested in Sibley. This is now vested in defendant Fisk. One-third of this half would properly belong to Darius Perrin, if not required for the purposes of the firm.

"8. In estimating the value of the assets, the claim against L. C. Kellogg shall be taken at the amount due from said Kellogg to the firm, less his credits, on the 19th day of October, 1864.

"9. The Herndon Hotel contract shall be stated at the face value thereof at that date, and the value of the Herndon Hall shall be fixed by the amount o. proceeds (net) thereof, with proper discount back to that date.

"10. Without further proof, the credit balance in favor of Perrin & Gilbert shall not be treated as a liability, nor shall the debit balance in favor of C. T. Gilbert be treated as an asset.

"11. In estimating the assets of the firm, all personal property on hand at that date, whether in the actual possession of the firm, or its members, in transit, or in the hands of agents, servants, consignees, or lessees, should be included at its true value; and all advances or

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indebtedness on account of such property should be treated as liabilities. The value of the wool charged in the A. T. Vary account should be fixed at the amount of the entire proceeds thereof, less such sums (if any) as shall be shown to have been actually and legitimately paid to said Vary for money advanced, or by way of his share of the profits of such transaction, of which he was entitled to one-half; all to be discounted to October 19, 1864.

"12. There was no binding agreement to pay a salary to H. J. Perrin, and no allowance should be made therefor.

"13. The claim of complainant, in relation to the Eau Claire Bank, is not sustained by the proof, and items 1,733, 1,734, and 1,735 of H. J. Perrin's account in complainant's Exhibit 163 (Van Vliet's Ledger) shall not be allowed as credits to H. J. Perrin, nor shall any interest thereon be allowed.

"14. The alleged deed of the bank building from H. J. Perrin to the Bank of Michigan, which purports to have been made in 1862, was not in fact executed until 1865, and no interest on the alleged purchase price of $16,000 should be credited or allowed to H. J. Perrin.

"15. Without further proof than the mere production of the same, the Sibley check of $2,132 should not be treated as payable to H. J. Perrin.

"That the Bank of Michigan, the State Stock Bank of Eau Claire, and the three Illinois banks referred to in the answer of Lepper and Fisk, were assets of the firm, and should be treated as such, and the checks of the firm and individual partners given for stock of said Bank of Michigan shall not be treated as liabilities.

"The value of the interest of Joseph Sibley as of October 19, 1864, in said firm, having been ascertained according to the principles of this decree, interest shall be computed thereon at 7 per cent., with annual rests, from said October 19, 1864, to January 11, 1880, and to the principal and interest thus ascertained shall be added a sum equal to 7 per cent. interest on $30,000 from September 7, 1864, to January 11, 1880, plus one-half of the insurance money received in 1867 on the buildings and improvements on the tenant in common property then destroyed by fire; and also the balance, if any, due from the Perrin estate to the Sibley estate on the value as of January 1, 1866, of the individual estate of Joseph Sibley that came to the hands of H. J. Perrin, over and above his lawful expenditures as executor, together with interest computed thereon at 7 per cent., with annual rests, to January 11, 1880, and the aggregate of these sums shall constitute a new principal, which, together with interest thereon at 7 per cent. to the date of this decree, shall constitute the sum for which the estate of H. J. Perrin is liable to the estate of Joseph Sibley.

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"On the coming in of said report, such further proceedings shall be had as shall be agreeable to equity and good conscience.

"FRANK A. HOOKER,
"Circuit Judge."

From this decree the complainant and all the defendants, except Darius Perrin and his two daughters, Caroline and Elizabeth, took their appeal to this Court. The cause was heard at the last January term. All the parties were represented upon the argument, which was able and exhaustive. In our examination of the record, we have been aided by over 1,400 pages of briefs, in which all the various features of the case are ably discussed. We have given the case a patient consideration, and in our examination have given careful attention to the points made by counsel, and to the testimony presented in this enormous record, and upon such examination we are satisfied that most of the material facts charged and averred in the answer of defendants Lepper and Fisk, and which are in support of the cross-bill, are true, and supported by the circumstances and proofs.

The articles of copartnership required that Horace J. Perrin and Joseph Sibley should each contribute an equal amount of capital. The amount to be contributed by Joseph Sibley was in bonds and mortgages, and he furnished to the firm in such securities $103,806.39. The amount furnished by Perrin is not stated in the articles. He was, however, allowed to contribute notes, bonds, and mortgages, if he desired to do so. Each party was to guarantee the amounts furnished to the firm in paper. The capital that each furnished was to be entered on the company books, and each was to receive credit thereon for the interest the securities furnished by him drew, until they were paid, and after that 7 per cent., and upon dissolution each party was to receive back from the firm such securities furnished by him as remained uncollected.

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They required that the profits and losses should be shared equally; that each party should give his time and labor to the firm, so far as was needful to make its business a success; that neither party should draw from the funds of the firm a greater sum than $1,000 per year, on which he was to be charged 7 per cent. per annum; that Darius Perrin might become a partner if he wished to, by allowing the use of his name as joint-partner under the articles of copartnership (sharing in the profits and losses).

They required regular and accurate books of account to be kept of all the transactions of the firm, to which both parties should have free access; and quarterly, in each year, an account of stock was to be taken, and a balance was to be struck showing the profits and losses of the preceding quarter; and, at the termination of the partnership, the business of the firm should be closed by the survivor as soon as it could be, proper regard being had to its interest, and a true account rendered and settlement made by him, as soon as practicable, with the legal representative of the deceased.

H. J. Perrin took upon himself the management and control of the business of the firm as soon as it was organized, and continued it as long as the firm existed. At Sibley's death he assumed, whether rightfully or not, all the trusts cast upon the executors in Sibley's will.

Preliminary to the argument, counsel for Darius, Caroline, and Elizabeth Perrin made a motion to dismiss the appeals taken, on the grounds that the order appealed from was merely preliminary and interlocutory, and not a final order, except as to the Sibley heirs; that—

"No order to take proofs in the cause, relating to the general merits of the respective controversies, had ever been entered;" and that "such proofs have not been taken, unless they are embodied in the mass of testimony taken under the order of reference above referred to."

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We do not think, under our previous decisions and the practice, this motion can be sustained. Substantial rights are affected. The Sibley heirs' claim was disposed of entirely. Claims were made against the Perrin estate for large amounts, which, under the order, were rejected, and claims made by the Perrin estate were heard, and to a very large amount rejected, by the decree appealed from. The order of the circuit court as to these was in its effect a final deposition thereof, and, when such is the effect, the order or decree is always regarded as appealable. It is the effect and not the form of the order or decree, or the particular classification of the same, which determines the question of whether or not it is appealable.

Whenever a substantial legal right is divested by an order or decree in a court of chancery, an appeal lies from such order or decree to this Court, to determine the legality of such proceedings; and we have no question but that the order made in this case, and from which the appeals are taken, is appealable. *Barry v. Briggs*, 22 Mich. 201; *People v. Simonson*, 10 Id. 335; *Lewis v. Campau*, 14 Id. 458; *Kirby v. Ingersoll*, 1 Doug. 477; *Heath v. Waters*, 40 Mich. 457, 466; *Bullard v. Green*, 9 Id. 222; *Smith v. Walker*, 57 Id. 456–488 (22 N. W. Rep. 267). See, also, *Callanan v. Shaw*, 19 Iowa, 183; *Thompson v. Pickel*, 20 Id. 490; *Oatman v. Bond*, 15 Wis. 20.

Regarding the effect of the order of reference, and what was intended by it, and what has really been done under it, more will be said further on. How it is to be construed depends, to some extent, as to what construction the parties and court placed upon it, and how they have treated it in the progress of the cause. The record shows that the amount of capital furnished by Sibley was entered upon such books as were kept, but H. J. Perrin's was not, and no statement upon the com-

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pany books was ever made, showing when or in what amount any capital was furnished to the firm by H. J. Perrin; that he never made any inventory of the property of the firm, nor took an account of stock, or made any statement showing the condition of the firm, or made any balance showing the profit or loss in its business, during its entire existence.

When H. J. Perrin became executor of the will of Joseph Sibley, he was made the trustee of his entire estate, whether individual, tenant in common, or copartnership, as it existed at Sibley's death under these three relations; and, in addition to these, he assumed (whether the will gave to him or not) the guardianship of Joseph Sibley's minor son and only child. No greater trusts can be reposed in, nor more sacred duties assumed by, any man in this world than were by Joseph Sibley, lying upon his death-bed, confided to H. J. Perrin; and it is the duty of a court of equity, when its authority is properly invoked in behalf of those in whose interest and for whose benefit the trusts have been created, to see to it that such trusts are faithfully carried out, and when it is intended to confer upon the trustee, as is claimed by him in this case, the extraordinary duty of extending to the *cestui que trust*—who is a minor, requiring parental care, culture, education, counsel, and protection—the protection of a guardian, great vigilance will be exercised by the court, when such trustee's action is brought under review, in examining into the manner that he has discharged the several and important charges committed to him; and the court will see to it that the confidence of the donor has not been betrayed, and that the conduct of the donee of the trust has been honest; that he has not neglected his duty or misappropriated the estate; that the estate is preserved from diminution by the negligence, avarice, wantonness, or fraud of the trustee; and that none of

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its interests have suffered from the incapacity, dishonesty, or reckless conduct of the guardian; and will secure the proper observance of the duties assumed by such trustee and guardian, according to the well settled and defined rules which have been so long adopted, and the wisdom and justice of which have been so long established by jurists in a succession of generations, both in England and this country, that a departure therefrom has come to be regarded as a want of capacity or dishonesty in a court which fails to observe and apply them.

These rules required Horace J. Perrin, as guardian, on the death of Joseph Sibley,—

First. To look after the personal needs, comfort, and welfare of the only son, Francis M. Sibley; to look after his habits, his education, secure for him the best advantage for business instruction, and give him such information and insight in regard to the estate of his father, and such instructions in relation thereto, as would eventually do most in qualifying him for its successful management and control. We have failed to find in the record any attention whatever given to the discharge of these elementary duties by H. J. Perrin during his assumed guardianship, and which was not to close with the maturity of Francis, but extended about 14 years thereafter. Indeed, it would appear that he gave no attention to them at all; and that about all the interviews Mr. Perrin appears to have had with Francis were when he was making contracts with him which he had no right to make, and which in most cases required the exercise of a judgment well matured and ripened by a large business experience, relating to matters which involved the consent of the young and inexperienced boy to investments of large portions of the Sibley estate, and in which Perrin was interested against the estate, and his conduct in relation thereto tended to impoverish rather than protect

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it, as it was his duty to do. For such neglect and abuse of the trust he had assumed, no adequate compensation can now be made, and never could have been, save in part.

Second. These rules required that, upon H. J. Perrin's taking upon himself the duties of executor of the estate of Joseph Sibley, he should have filed in the probate court not only a true and correct inventory of the individual property and assets of the estate, but also of the tenant in common property as well as of the partnership property. The latter inventory should have shown who were the partners; the place where the firm carried on business, and the nature and character of the same; the terms of the copartnership; the capital contributed by each partner; and some statement of the assets and liabilities, so far as he knew them, or could ascertain them with any reasonable certainty. No such inventories were filed by Perrin, and such statements as were filed were incorrect, and better calculated to mislead the heir than to give him any correct information in regard to the partnership estate, or the extent thereof, or of the tenant in common property.

Third. They required Horace J. Perrin to enter upon a book a correct account of every piece of property belonging to the estate of Joseph Sibley when he died, showing its situation, and Sibley's interest therein; keeping the individual, tenant in common, and partnership interests each in a separate and distinct account. A debit and credit account should have been kept with each, showing, at least, the accumulations or losses, if any, in the same, annually. This he never did, but, on the contrary, kept no regular account with either of said properties, and, in such accounts as he did keep, mixed up the tenant in common, individual, and partnership interests with his own personal accounts in a confused

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mass of entries, in such manner as to render it impossible for any accountant to separate the same, and to make up a true and correct statement of account therefrom; and an inspection of the accounts and the papers which were kept by Perrin relating to Sibley's interest forces us to the conclusion that fraudulent entries were made, and items fraudulently omitted therefrom, with the manifest intention of depriving those entitled to the estate of that which in justice and equity belongs to them; that Perrin's mode and manner of dealing with these several interests, and the property belonging thereto, both real and personal, have been in violation of every trust assumed by him in relation to the same, and that the accounts were kept in such manner, if relied upon and followed, as to give the entire Sibley estate to H. J. Perrin, and to those in whose custody he had fraudulently placed the property; and that no correct or reliable account can be made up therefrom, showing what has been done with the estate of Joseph Sibley, and its earnings. Five or six different accountants have attempted the task since the death of Perrin, and have failed to satisfy any one that the true situation of the account and the proper result has been arrived at, and several of these men are conceded experts.

Fourth. They required Horace J. Perrin, in the shortest time reasonably consistent with the best interest of the estate, to collect in a sufficient amount of the assets of the same to pay its just debts and the special bequests made in the will of the deceased, and to defend the estate against all unjust claims; to ascertain and collect in all outstanding claims not well secured; to ascertain and settle the net amount of the assets, and report the same, with a full account of his doings in relation thereto, to the probate court, and obtain its order for such further

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disposition of the same as it might deem proper to make. Not one of these requirements did H. J. Perrin perform or observe, but, on the contrary thereof, he never collected in the claims of the estate, as he should have done. He did not pay the debts, annuities, and legacies as it was his duty to do. He did not defend the estate against unjust claims, but permitted illegal and unjust claims to be allowed against the estate, and, as the record tends strongly to show, himself attempted to make an illegal claim before the commissioners, and aided the allowance of illegal claims of others, and never made any settlement of the estate, or any correct statement or report of his doings, as such executor, to the heir or the probate court.

Fifth. They required H. J. Perrin at all times to keep his accounts, with the several interests belonging to the estate of Joseph Sibley, in such manner that he could, when properly called upon, be able to give to those who were interested in the estate, and especially to the heir and legatees, the situation of the estate, and all the information he could of interest to them during the progress of its settlement; and allow them, and their attorneys, who were acting in good faith, opportunities to inspect the books and papers of the deceased and of the copartnership, and all the records relating to the estate in either of its departments.

From what appears in the record, there is little doubt, we think, but that H. J. Perrin, so long as he lived, and had charge of his business, knew all about the Sibley estate, and its increase while in his hands and under his control, and could at any time, with the aid of such accountants as he had in his employ, in a reasonably short time, have given the defendants, or either of them, a comparatively accurate and correct statement of Joseph Sibley's interest. To hold otherwise would be to impeach

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every witness' testimony who has testified in the case as to H. J. Perrin's business ability; and the fact that he so managed the business of the firm as to make its capital, in the period of less than 25 years, earn for its owners nearly $1,000,000, ought to be sufficient alone to satisfy any reasonable mind that he must have known who were his creditors, and the amount he was at all times owing them, and that he did not trust altogether to his memory to retain evidence of such facts.

And it is equally apparent from the record that important legal evidence of the dealings he had with the partnership property, both before and after the death of Sibley, has been either suppressed or destroyed; and that the heir is to a very great extent at the mercy of H. J. Perrin, and his representative, to make such disclosure and present such evidence of H. J. Perrin's dealings with the property of the firm while Sibley lived, and of his management and custody of the same since his death, as H. J. Perrin and his representative might be pleased to make.

The record further shows that, when the heir became of age, he could get no statement from H. J. Perrin, except that he was his guardian, clothed with absolute power, for the control of the estate, and could render no accurate account; and a few years later, when the heir made his legal demand in a court for information in regard to the estate, and for the means to supply necessaries for his family, the executor informed him that he had no estate, and that his father died insolvent; and when the heir was obliged to make resort to the proper courts to compel disclosure of facts which common honesty, and a decent respect for the dead, should have induced the trustee to make voluntarily and with pleasure, he came into court with such incorrect, deceptive, and fraud-

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ulent accounts as he thought would make good his statements made to the heir.

Sixth. These rules required him to work for the best interests of the estate at all times; to so keep, manage, and invest the property of Joseph Sibley that he could, in case of the death of Francis M. Sibley, turn it over to the person or persons entitled within a period of 12 months, freed from all complications with his own or the property of others. These things he did not do. The record shows he used the estate almost exclusively for the interest of Perrin; that, with the exceptions of the debts and legacies he paid, he kept, managed, invested, and used the Sibley estate for his own use and purposes, the same as though he was the exclusive owner thereof, and under no trust obligations in relation thereto; and, when young Sibley died, claimed his father's estate was not only exhausted, but was largely indebted to him, and he had nothing to turn over to those who could rightfully claim the same.

Seventh. And these rules finally required the trustee, upon the death of Francis M. Sibley, if he was in doubt about the proper construction of the will, in regard to making final distribution of the estate, to make application to the proper court, and have the question settled, and take its direction in the matter.

Now, it appears very clearly from the record that not one of these several things did he do. He was beyond all question cognizant of what was necessary for him to do in the premises in the discharge of all his duties. He was presumed to know the law, and we think, further, he did know the law; for the record shows, from the very beginning of his financial relations to these trusts and beneficiaries, and running through the entire period of his trust obligations, he availed himself of the

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counsel and services of the ablest lawyers of the State, as well as of those outside the State, and deliberately chose to take the course he did, and manage the estate of Joseph Sibley in the manner appearing in this record. And we think that it further appears from the case, as presented to us, that Darius Perrin was the relative, and early adviser and friend, of H. J. Perrin; that, from the beginning of the business relations between H. J. Perrin and Joseph Sibley, the transactions between Horace J. Perrin and Darius show an intimacy in the conduct and modes and manner of conducting the business, up to the time of the death of H. J. Perrin, which unavoidably makes him a participant in most of the illegal and fraudulent transactions by which Mrs. Fisk had been deprived of whatever she is entitled to of Joseph Sibley's estate; and, inasmuch as he never furnished any capital to the firm of Horace J. Perrin & Co., he is not entitled now to any share of the income arising from the capital furnished to the firm by Joseph Sibley, and Mrs. Fisk should not now be troubled with the litigation, expense, and delay in ascertaining what may be the interest of Darius in the estate of Horace J. Perrin, but said estate of Darius should be left to adjust such interest as may in the future be found necessary to a proper disposition thereof.

It is also quite evident that the two daughters of Darius Perrin, Elizabeth and Caroline, are only interested in this suit through the deceptions used by Horace in covering up transactions by which he sought to absorb the estate of Joseph Sibley; at least, no other object appears in the record in transferring to them property of the company, and one of them admits in her answer that she has no interest in a part transferred to her, and is willing to retransfer the same to whom it in equity belongs, whenever the court may so order. It is quite manifest that such transfers were made and managed through some arrange-

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ment and dealings between Horace and Darius, with which Mrs. Fisk ought not to be troubled, but that those matters should be left for adjustment with the estate of Horace J. Perrin, and this should be so ordered, and Mrs. Fisk be relieved therefrom. In the view we take of the case, it is unnecessary to determine, as between these two defendants and Mrs. Fisk, whether they were or not knowing to or participated in Horace's schemes of fraud, or as to any connection Darius may have had therewith.

It is now more than 24 years since Joseph Sibley died, and Horace J. Perrin took exclusive possession and control of his estate, and assumed to take control of the person of his only heir, as his guardian. During the first two years thereafter there was no one to call him to an account, and it is now more than 20 years since the heir, Francis M. Sibley, filed his bill of complaint, for the purpose of obtaining an accounting in relation to the business of said firm of H. J. Perrin & Co., and the various trusts with which he was charged by Dr. Sibley, and for the settlement of his estate; and it is averred by the complainant that H. J. Perrin's and complainant's litigation expenses in the course pursued has cost H. J. Perrin and his estate about $150,000, and which, it appears by the record, long since exhausted the property of Mrs. Fisk. Justice requires that this litigation should now be closed, so far as it can be and preserve the rights of parties, and Mrs. Fisk earnestly asks that it may be, so far as her rights are concerned upon this reference, and especially as between the complainant and Mrs. Fisk and Mr. Lepper; the merits having been fully gone into.

For over 20 years, H. J. Perrin, while living, and his administrator since his death, have been fully made aware of the claims of Sibley's estate in the premises; and it is

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manifest from the record that all the testimony which can be obtained from records, or witnesses now living, has been put into the record, and, when the case was heard upon these proofs, the circuit judge had before him all that he could ever have when finally passing upon the case. In passing upon the question made under this order of reference, the court must finally dispose of the merits of the case between the Perrin estate and Mrs. Fisk. When the basis or principles of the mode of accounting are fixed, in the view we take of the case, nothing remains to be done but to compute the amount, and no further or other reference is necessary for that purpose, so far as the partnership interests are concerned; and we shall not send the case back for that, so far as it relates to Mrs. Fisk and Mr. Lepper, or the interest they or either of them represent, but make a final disposition of those interests here.

The longer we have examined this record, the more manifest it is to us that no accurate or reliable statement can be made of the accounts of the firm business, or of the balances due to the partners therein from each other, from the accounts now in existence presented by the complainant for that purpose; that important portions of the accounts of the business of that firm now remaining have been either withheld, suppressed, or destroyed, and such as have been presented to a certain extent bear evidence of mutilation, and are found to be so incorrect, false, and fraudulent as to be unfit to furnish any correct basis or *data* for an accounting; and that the efforts made for that purpose only show the correctness of this conclusion.

The complainant has summoned the defendants into a court of equity to have the liability of the estate of Horace J. Perrin to Mrs. Fisk, and the extent thereof, ascertained, and its rules will not allow it to be ascertained from such

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imperfect accounting as is here presented; and when such is the case, and the amount of capital furnished by the deceased partner is known or can be ascertained with a reasonable degree of certainty, the rule that the *cestui que trust* may either follow that fund, and take the profits, or take the fund furnished to the copartnership, with such interest, in lieu of profits, computed in such manner and at such rate as will, in view of all the facts and circumstances, be in accordance with the principles of equity and justice between the parties, must be applied; and it must be held that Horace J. Perrin, in taking the course he did in the management of the various trusts committed to his charge, elected that this rule might be applied in case equity should be resorted to in the settlement of these accounts, and his heirs must abide thereby. We all think this rule should govern in this case, as it now comes before us, and, if authorities or precedents were necessary to establish the views herein taken, the following fully support the position: Pars. Partn. 433; Hill, Trustees, 816; Lindl. Partn. 668; *Millerd v. Ramsdell,* Har. Ch. 373; *Eason v. Cherry,* 6 Jones, Eq. 261; *Willett v. Blanford,* 1 Hare, 265, 269; *Case v. Abeel,* 1 Paige, 393; *Forrester v. Oliver,* 1 Bradw. 259; *Brown's Appeal,* 89 Penn. St. 139, 147; *Chittenden v. Witbeck,* 50 Mich. 401 (15 N. W. Rep. 526); *Sheldon v. Rice Estate,* 30 Id. 296; *Dwight v. Blackmar,* 2 Id. 330; *Heath v. Waters,* 40 Id. 457; *Pomeroy v. Benton,* 77 Mo. 64; *McKnight's Ex'rs v. Walsh,* 23 N. J. Eq. 136; 2 Story, Eq. Jur. § 1277; Lewin, Trusts, 361, 363, 364; 1 Perry, Trusts, § 471; *Schieffelin v. Stewart,* 1 Johns. Ch. 620; *Walker v. Walker,* 9 Wall. 743; *Hook v. Payne,* 14 Id. 252; *King v. Talbot,* 50 Barb. 453; *Hough v. Harvey,* 71 Ill. 72; *Miller v. Congdon,* 14 Gray, 114; *In re Harland's Accounts,* 5 Rawle, 323, 332; 2 Pom. Eq. Jur. §§ 1063, 1076; 2 Williams, Ex'rs, 1573; *Walrond v. Walrond,* 29

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Beav. 586; *Jones v. Foxall,* 15 Id. 388; *Williams v. Powell,* Id. 461; *Diffenderffer v. Winder,* 3 Gill & J. 311; *Adair v. Brimmer,* 74 N. Y. 539; *Price v. Peterson,* 38 Ark. 494; *Eliott v. Sparrell,* 114 Mass. 404; *Jennison v. Hapgood,* 10 Pick. 77; *Ogden v. Larrabee,* 57 Ill. 389; *Walmsley v. Walmsley,* 3 Jones & L. 556. See, also, Lindl. Partn. 993; *Clarkson v. De Peyster,* Hopk. Ch. 424. See same case in 2 Wend. 78; *Insurance Co. v. Lynch,* 11 Paige, 520; *Hazard v. Durant,* 14 R. I. 25; *Cruce v. Cruce,* 81 Mo. 676; *Barney v. Saunders,* 16 How. 539; 1 Suth. Dam. 623; *Hollister v. Barkley,* 11 N. H. 511; Underh. Trusts, 178.

It is admitted by counsel for complainant that Joseph Sibley contributed, as capital to the firm of H. J. Perrin & Co., the sum of $103,806.39, consisting of money, notes, bonds, and mortgages, as required in the articles of copartnership; and that these securities were good is evidenced by the fact that there was ultimately realized from them upwards of $183,000. They mostly drew 10 per cent. interest.

We think it sufficiently appears, if we were to charge the Sibley estate with the $65,000 for half the mill property, there was still due the estate at his death, on account of the amount received on the securities contributed as his capital, about $36,000, and there still remained unpaid of these securities, principal and interest, over $97,000, besides his interest in the profits of the firm, which we have no doubt were considerable; and which sums, together with the excess of his individual estate, after the payment of the debts of the estate, and the legacies mentioned in the will, left in the hands of H. J. Perrin a sum largely in excess of Sibley's capital contributed to the firm, and we have no doubt, when we fix the sum upon which interest should be recovered at $104,000, we have done no injustice to the estate of Horace J. Perrin.

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The question of what interest should be allowed, and when rests should be made in computing it, depends so largely upon the circumstances of each case that no rule can be fixed applicable in every case. When laches may be attributed, or wrongful and excessive claims are made upon the trustee by the *cestui que trust*, they become mitigating circumstances, and should be taken into account, and, though claimed by counsel for complainant in this case, we find no foundation in the record to base such claim upon. And while I am satisfied from the record in this case that the whole history of the administration of the trusts assumed by Horace J. Perrin, as surviving partner, executor, and guardian, shows a deliberate purpose, never for a moment lost sight of, to conceal, as far as possible, without openly avowing his purpose, all information in respect to the trust-estates he was bound to account for, and disclose to the heir and the courts his dealings with them; to render the ascertainment of their amount impossible; to fraudulently absorb and appropriate them to his own use, and to render redress impossible, for want of friends and means to prosecute the litigation; and that in the prosecution of his purpose, the record discloses, he showed wonderful fertility and resources, and a relentlessness amounting to cruelty,—still I recognize the doctrine in equity that the Court will not omit to take into consideration the consequence of its decrees, and consider them in connection with the other circumstances in the case, and see to it that an oppressive or unjust result shall not be reached. The precise sum the *cestui que trust* should receive, and which the trustee should pay, is that which the former has lost by the failure of the latter to honestly and properly administer the trust. Where the trustee has misappropriated the fund, or neglected to invest it when he should, the *cestui que trust* will be presumed to have lost, at least,

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the lawful interest upon the same; and, if the fund has been so used that the accumulations in the hands of the trustee reach beyond the interest on the fund, the court will decree to him, as his loss, whatever may have been so received.

If the trustee fails or refuses to account, he may be charged with the fund, and such accumulations thereon as the best management of the most successful business men would be likely to secure for it, as it will be presumed the trustee has received as much, or he would have reported his gains, and which will in such case be held the measure of the *cestui que trust's* loss. If such gains have been greater than the interest, or the interest compounded, it is given to the beneficiary, not on the ground that it would be presumed to earn a larger sum, but because the court will not allow the trustee to take profit from his own wrong; and that, as between him and the beneficiary, the latter has the better right to the excess, the interest of no other person being involved therein. If, however, the trustee has shown an utter disregard for the interest of the beneficiary, and deliberately planned to absorb the trust fund by his fraudulent disposition of it to his use, and attempts to destroy or suppress the evidence of his management of the fund, and the profits he has received therefrom, and so far succeeds in his purpose that no one but himself can trace the fund or its accumulations, and when called upon to account he renders false and fictitious accounts, so defective as to be impossible of proper judicial investigation and adjudication, in such case, if the amount of the fund which he has used can be ascertained, he may be charged therewith, and the largest profits that can lawfully be made thereon by the most sagacious and expert business men in their management of money, even to the allowing of compound interest at the highest lawful rates, and mak-

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ing rests annually or semi-annually, if it shall appear just and equitable to the court, in securing to the *cestui que trust* the use of his property of which he has been deprived. The law entitles him to all the accumulations of his property while in the trustee's hands, and, under the circumstances stated, when he refuses to account, it will be presumed he has received such accumulation, and that such amount is the beneficiary's loss, and a court of equity may give it to him.

Such sum is not awarded for the purposes of punishing or imposing a penalty on the trustee for his maladministration of the trusts. Courts of equity do not impose or enforce penalties, or punish parties for their wrongs in the administration of trusts, but only furnish the adequate means of redress when the law fails so to do. Beyond this they do not go, unless so directed by the law-making power. *Gott v. Culp*, 45 Mich. 265 (7 N. W. Rep. 766); *Moyer v. Fletcher*, 56 Id. 508 (23 N. W. Rep. 198); *Heath v. Waters*, 40 Id. 457; *Loomis v. Armstrong*, 49 Id. 521 (14 N. W. Rep. 505); *Roberts v. Kelsey*, 38 Id. 602; *Chittenden v. Witbeck*, 50 Id. 401 (15 N. W. Rep. 526); *Dwight v. Blackmar*, 2 Id. 330; 2 Pom. Eq. Jur. 655, 658; 1 Story, Eq. Jur. 322; 1 Perry, Trusts, § 205; 2 Williams, Ex'rs, 938; 4 Kent, Comm. 429; *Nelson v. Hayner*, 66 Ill. 487; *Case v. Abeel*, 1 Paige, 393; *Sheldon v. Rice Estate*, 30 Mich. 296; 2 Redf. Wills, 882; *Berwick v. Halsey*, 4 Redf. Sur. 18; *Clarkson v. De Peyster*, Hopk. Ch. 424; 2 Kent, Comm. 230; *Heward v. Slagle*, 52 Ill. 336; *Brown's Estate*, 11 Phila. 127; *Cornell v. Gallaher*, 16 Cal. 367; Hill, Trustees, 429, 812, 839; *Anderson v. Lemon*, 8 N. Y. 236; *Mitchell v. Reed*, 61 Id. 123, 84 Id. 556.

In this case, it clearly appears that both the accounts of Horace J. Perrin, as presented, as surviving partner, should, and of his administration of the Sibley estate, at least,

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uncertain, erroneous, imperfect, and fraudulent as to be unfit for judicial investigation, and that we now have before us all the testimony that can be obtained, material, relating thereto; and, for these and other reasons hereinbefore stated, we think it should be held that the defendants Lepper and Fisk must have of the estate of Horace J. Perrin, now under the control of the complainant as his administrator, a return of the capital Joseph Sibley put into the firm of H. J. Perrin & Co., fixed, at the date of his death, at the sum of $104,000, with interest thereon computed at the rate of 10 per cent. from October 7, 1864, to January 11, 1880, and from the last-named date, on the amount of said principal and interest, to wit, $262,715.55, at the rate of 7 per cent. until the date of entering the decree in this Court, amounting to the sum of $426,029.66, with costs of both courts to defendants Lepper and Fisk, in this suit, to be taxed by the clerk of this Court, including a solicitor's and counsel fee of $20,000,—said sum of $426,029.66 to be paid by the complainant, as executor, from the property of the estate of Horace J. Perrin, as follows: $100,000, and the costs as taxed, including said solicitor's fee, within 90 days, $163,014.88 within six months, and the remaining sum of $163,014.88 within one year, from the date of the entry of this decree, with interest at 7 per cent. on each of said installments until paid; and that said sums, when so paid, shall be in full satisfaction of all claims of Mrs. Fisk to the estate of Joseph Sibley, under his last will, except so far as it relates to the real estate which was held in common by Horace J. Perrin and Joseph Sibley at the time of the latter's death.

The real estate in the firm name, or belonging to the firm, whether held in trust or otherwise, is decreed to be personal property and assets of the firm of H. J. Perrin & Co.; and defendants Lepper and Fisk are hereby

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directed and decreed to quitclaim, release, and assign all right, title, or interest they have, or claim to have, therein, to the administrator of Horace J. Perrin.

The tenant in common property, standing in the name of Horace J. Perrin and Joseph Sibley, is declared to be and to belong to the defendant Fisk, and the heirs of Horace J. Perrin, in the proportion of one-half to Mrs. Fisk and the other half to the heirs of Horace J. Perrin.

That portion of the real estate alleged in the bill to be tenant in common property, which has been sold or conveyed away, if any, the Court doth declare and decree as follows: That Horace J. Perrin had in his hands, at all times, sufficient funds belonging to the estate of Joseph Sibley to pay and discharge all taxes, liens, and incumbrances, and it was his duty to keep the title to such property intact; and if it be found, upon reference, that he has permitted or caused such lands to be sold, and the title placed in outside parties, it is declared that he shall be chargeable with the value of the one-half of the said lands, belonging to the said Sibley estate, at the date of such sale or sales, and shall account with defendants Lepper and Fisk therefor at that date, and shall be charged with interest thereon at the rate of 4 per cent. to the date of this decree. To this end a reference will be had to a commissioner, to be designated by the circuit judge of the Calhoun circuit, to ascertain and determine what land was owned as tenants in common by Joseph Sibley and Horace J. Perrin at the time of said Sibley's death, the title to which has been incumbered or clouded by any sale or conveyance thereof since such death; and also what lands so owned as tenants in common, if any, have been transferred; and, upon the coming in of the report of such commissioner, the said circuit court shall enter a final decree, in accordance with this opinion, in respect to said tenant in common lands.

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The claims presented against the estate of Joseph Sibley, before the commissioners for allowance, and found in their report, under the heading, "Claims against H. J. Perrin and J. Sibley and H. J. Perrin & Co., presented against the estate of J. Sibley, deceased," were all improper claims for allowance against the estate of Joseph Sibley, and the allowance of the same, or of any portion thereof, must be held void, and decree will be entered accordingly.

Decree will also be entered in regard to the interests of defendants known as the Sibley heirs, under the will of Joseph Sibley, that they have no such interest as is claimed by them under said will; and that as to the defendants Perrin the bill will be allowed to stand for such further proceedings as they may desire to take, or as they shall be advised may be necessary, to protect any rights they may have in the premises, and the costs, as between them and complainant, will abide the final disposition of such defendants' interests in this suit.

The decree entered in this cause, and appealed from, will be modified, and entered as herein directed, which entry will be made of this date.

CHAMPLIN, MORSE, and LONG, JJ., concurred. CAMPBELL, J., did not sit.

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PETER E. PARK v. THE DETROIT FREE PRESS COMPANY.

Constitutional law—Libel—Act of 1885—Criminal charge—Bastardy—Privilege—Files in civil case—Evidence—Damages.

1. Act No. 233, Laws of 1885, as amended by Act No. 189, Laws of 1887, limiting the recovery in suits brought for libel in certain cases to actual damages, as defined in said act, is not within the power of constitutional legislation.
2. In an action for libel the plaintiff may show that various other persons called his attention to the libelous article.
3. The mischief of a libel consists in the fact that it is actually seen by third persons, and the circulation of a paper is allowed to be shown, as making it probable that the article has been read by several persons.
4. There is no rule of law which authorizes any but the parties interested to handle the files or publish the contents of their matters in litigation.
5. One of the reasons why parties are privileged from suit for accusations made in their pleadings is that their pleadings are addressed to courts where the facts can be fairly tried, and to no other readers.
6. The public have no rights to any information on private suits till they come up for public hearing or action in open court; and, when any publication is made involving such matters, they possess no privilege, and the publication must rest on either non-libelous character or truth to defend it.
7. It has been uniformly held that the public press occupies no better ground than private persons publishing the same libelous matter, and, so far as actual circulation of libels is concerned, there can be no question which is more likely to spread them.
8. Any one, whether reporter or otherwise, who undertakes to give to the public the contents of a document which speaks for itself, and in which he has no personal concern, is bound, if he would reduce his liability, to use such a degree of care as is reasonably sure to prevent mistake, and to publish nothing not so obtained, which will inure to the injury of another.
9. The following propositions are summarized from the opinion of Mr. Justice CAMPBELL:

   a—When a man is charged with doing what if done by him

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can be nothing else than a crime, it cannot be said not to involve a criminal charge because other persons might not be so guilty.

b—It is the thing charged on the person libeled as done by him, and not by some one else, which makes the libel. It must especially injure him, if believed, among those who know him personally, and if to them the charge made involves a crime, the degree of which makes it disgraceful, it involves it none the less because the publisher did not so consider it by mistake of fact or law.

c—There is no room for holding in a constitutional system that private reputation is any more subject to be removed by statute from full legal protection than life, liberty, or property. It is one of those rights necessary to human society that underlie the whole social scheme of civilization. It is a thing which is more easily injured than restored, and where injury is capable of infinite mischief; and, on the other hand, it is one where the injury is frequently, and perhaps generally, aggravated by malice. The law has therefore always drawn distinctions between intentionally false and wicked assaults on character, and those which were not actually designed to create a false impression, although necessarily tending to injure reputation if false in fact, but it has made both actionable.

d—It is not competent for the Legislature to give one class of citizens legal exemption from liability for wrongs not granted to others; and it is not competent to authorize any person, natural or artificial, to do wrong to others without answering *fully* for the wrong.

Error to Wayne. (Gartner, J.) Argued October 9 and 10, 1888. Decided November 28, 1888.

Case for libel. Plaintiff brings error. Reversed. The facts are stated in the opinion.

James H. Pound, for appellant.

Black, Moran, Wilkins & Gray, for defendant.

CAMPBELL, J. Plaintiff sued defendant for publishing a libel against him to the effect that he had been the day before, which was June 23, 1888, arrested and brought before one of the justices in Detroit on a charge of bas-

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tardy, and on his plea of not guilty was released on his personal recognizance to appear on June 29 for his preliminary examination.

To this cause of action the defendant pleaded the general issue, with notice of special defense, to the effect that one of its reporters, who was a prudent and skillful person, obtained the information in good faith from the clerk of the court, and that it was published without malice or negligence, and is claimed to be privileged; that on the next day a correction was published as conspicuously as the libel, to the effect that the plaintiff was the attorney for the prosecution, and not the defendant in the bastardy case, and that the mistake occurred through the justice's clerk, who gave plaintiff's name as the defendant, and that on the file-wrapper plaintiff's name was so placed as to appear as defendant; that everything was done in good faith, and that the falsehood was due to mistake. Defendant claimed that under the statute nothing but actual damages, within the limited statutory definition of that term, could be recovered.

Upon the trial proof was made of the publication of the libel, and of the circulation of the paper, and that plaintiff was and had been for several years a married man, and a member of the Detroit bar, and the father of children. On cross-examination, plaintiff testified that he was employed to prosecute Clixby, the defendant in the bastardy case, and was not present in court when he was arrested, but attended the examination subsequently and after the libel was published. There was some conflict as to what occurred, subsequently to the publication of the libel, in the clerk's office, between Mr. Kinney, the clerk, and Mr. Robison, the reporter; and some conflict whether Robison got his information from the clerk, or from examining the file. The justice swore positively

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that Robison asked him about the case as the Clixby case first, and that he referred him to the clerk, and Robison denied that he saw the justice at all. There was also a conflict whether Robison knew plaintiff.

The apology was published the day after the libel. Above it was an open heading, reading as follows:

"Record of the Courts. The legal Mills are Grinding Chiefly on Matrimonial Misunderstandings. Correction of an Annoying Error. Probate Notes. Miscellany. Correction of an Annoying Error."

This was published in the same part of the paper with the libel. It is not disputed that, so far as plaintiff is concerned, it was a full retraction.

Several questions are presented concerning the reception and rejection of evidence. The court below instructed the jury at some length, but to the general effect that the liability of the defendant was relieved by the statute of 1887 by the retraction, if there was no bad faith; that the article charged no crime, unless the reporter had reason to believe the plaintiff was married; that the fact that the plaintiff was not living with his family—his wife being insane—was one of the facts to be taken into consideration, as well as his not being known to the reporter; that if the case was within the statute, no actual damages having been shown, there could be no recovery. Further reference will be made to the charge more specifically. The jury under the charge, although not positively, were practically, ordered to find, and did find, for the defendant.

As the statutes of 1885 and 1887 were the decisive element in finding a verdict for the defense without even nominal damages, that question requires first attention.

By Act No. 233, Laws of 1885, it was enacted that, in suits brought for the publication of libels in any newspaper, the plaintiff should only recover actual damages if

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it shall appear that the publication was made in good faith, and did not involve a criminal charge, and its falsity was due to mistake or misapprehension of the facts; and that in the next regular issue of said newspaper after such mistake or misapprehension was brought to the knowledge of the publisher or publishers, whether before or after suit was brought, a correction was published in as conspicuous a manner and place in said newspaper as was the article sued on as libelous. By section 3 of the act of 1885, it was enacted:

"The words 'actual damages' in the foregoing section shall be construed to include all damages the plaintiff may show he has suffered in respect to his property, business, trade, profession, or occupation, and no other damages."

The statute of 1887 merely changed the words "the foregoing section" to "this act." Laws of 1887, p. 153.

This act was held by the court below to exempt defendant, because bastardy is not in the strict sense a criminal proceeding, unless the defendant or Robison knew, or should have known, plaintiff to be a married man, so that the charge would be adultery.

If the case depends on that statute, and if that statute is valid, the construction given goes beyond the language, and does not seem to be the proper one. When a man is charged with doing what if done by him can be nothing else than a crime, it cannot be said not to involve a criminal charge, because other persons might not be so guilty. It would lead us into conjecture to seek out any meaning in this statute beyond the language. There seems to have been an idea in the minds of its framers that charges of crime were so much more heinous than other charges as to make it proper to punish them in heavy damages in spite of good faith, when charges of things not crimes are treated as comparatively trivial.

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But every one knows that there are many technical crimes involving no infamy, and acts not indictable which are utterly disgraceful. We can hardly imagine the Legislature meant to disregard the common-sense rule that it is the thing charged on the person libeled as done by him, and not by some one else, which makes the libel. It must especially injure him, if believed, among those who know him personally, and if to them the charge made involves a crime, the degree of which makes it disgraceful, it involves it none the less because the publisher did not so consider it by mistake of fact or law.

But we do not think the statute controls the action, or is within the power of constitutional legislation. This will, in our judgment, appear from a statement of its effect if carried out. It purports to confine recovery in certain cases against newspapers to what it calls "actual damages," and then defines actual damages to cover only direct pecuniary loss in certain specified ways, and none other. In some of these defined cases the proof of any damages in this sense would be impracticable, and in all it would be very difficult. They are confined to damages in respect to property, business, trade, profession, or occupation. It is safe to say that such losses cannot be the true damage in a very large share of the worst cases of libel. A woman who is slandered in her chastity is under this law usually without any redress whatever. A man whose income is from fixed investment or salary or official emolument, or business not depending upon his repute, could lose no money directly unless removed from the title to receive his income by reason of the libel, which could seldom happen. If contradicted soon, there could be practically no risk of this. And the same is true concerning most business losses. The cases must be very rare in which a libel will destroy business profits in such a way that the loss can be

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directly traced to the mischief. There could never be any loss when employers or customers know or believe the charges unfounded. The statute does not reach cases where a libel has operated to cut off chances of office or employment in the future, or broken up or prevented relationships not capable of an exact money standard, or produced that intangible but fatal influence which suspicion, helped by ill will, spreads beyond recall or reach by apology or retraction. Exploded lies are continually reproduced without the antidote, and no one can measure with any accurate standard the precise amount of evil done or probable.

There is no room for holding in a constitutional system that private reputation is any more subject to be removed by statute from full legal protection than life, liberty, or property. It is one of those rights, necessary to human society that underlie the whole social scheme of civilization. It is a thing which is more easily injured than restored, and where injury is capable of infinite mischief. And, on the other hand, it is one where the injury is frequently, and perhaps generally, aggravated by malice. The law has therefore always drawn distinctions between intentionally false and wicked assaults on character, and those which were not actually designed to create a false impression, although necessarily tending to injure reputation if false in fact, but it has made both actionable.

This statute has not apparently attempted to relieve any persons but the publishers of newspapers from responsibility for every injury to character by libel, whether intentionally false or not. If a person not a publisher had written in a letter just what this paper published, and had done so under the same impression which Mr. Robison had, the statute would not save him from full responsibility for the damages of all kinds, to which the general rules of law have always subjected persons guilty

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of libel. While the statute is certainly ambiguous, we cannot attribute to the Legislature the monstrous wrong of shielding the intended malice of writers, who impose on fair-minded publishers, from responsibility for newspaper libels, because the publishers themselves may be innocent of deceit, or of making the publishers responsible for the full degree of actual malice in the writer who misinforms them. In the present case the reporter himself admittted that he was not disposed to make as full a retraction as the managers required him to make, but their good faith should not be impugned by his reluctance.

It is not competent for the Legislature to give one class of citizens legal exemptions from liability for wrongs not granted to others; and it is not competent to authorize any person, natural or artificial, to do wrong to others without answering fully for the wrong. We do not think this statute has any bearing on the case, and the court erred in making it control.

As the case must go back for a new trial it is necessary to notice some other questions likely to arise again, and which probably might have been differently decided had the statute been left out of view.

Plaintiff was not allowed to show that various other persons called his attention to the libelous article. We can see no reason why such facts were not pertinent. The mischief of a libel consists in the fact that it is actually seen by third persons. The circulation of a paper is allowed to be shown, as making it probable that the article has been read by several persons. Evidence of actual knowledge cannot be inferior to presumption. In *Steketee v. Kimm*, 48 Mich. 322 (12 N. W. Rep. 177), a claim was made that there could be no presumption in an American community that articles in Dutch would be read by any one; but we had no difficulty in finding that

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Hollanders could and might do so. It would certainly have been proper in that case to show that Hollanders actually did read the libel, and there was convincing proof that it affected the plaintiff's business. In many, if not most, cases, actual pecuniary injury to business could not be shown without incidentally or directly indicating that there must have been individual readers.

There was a good deal of testimony in the case admitted, under objection, from reporters, and perhaps some others, concerning difficulty in getting personal access to files of the justices, and how they usually obtained information as to their contents, and upon what information they acted. The testimony was conflicting on this.

The whole defense in this case rested on the claim that bastardy proceedings are not criminal, but rest on the footing of civil remedies. There is no rule of law which authorizes any but the parties interested to handle the files or publish the contents of their matters in litigation. The parties, and none but the parties, control them. One of the reasons why parties are privileged from suit for accusations made in their pleadings is that the pleadings are addressed to courts where the facts can be fairly tried, and to no other readers. If pleadings and other documents can be published to the world by any one who gets access to them, no more effectual way of doing malicious mischief with impunity could be devised than filing papers containing false and scurrilous charges, and getting those printed as news. The public have no rights to any information on private suits till they come up for public hearing or action in open court; and, when any publication is made involving such matters, they possess no privilege, and the publication must rest on either non-libelous character or truth to defend it. A suit thus brought with scandalous accusations may be discontinued without any attempt to try it, or on trial

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the case may entirely fail of proof or probability. The law has never authorized any such mischief. In *Scripps v. Reilly*, 35 Mich. 371, 38 Id. 10, this Court found it necessary to decline accepting the doctrine of privilege in such cases. It has been uniformly held that the public press occupies no better ground than private persons publishing the same libelous matter, and, so far as actual circulation of libels is concerned, there can be no question which is more likely to spread them. It is undoubtedly true that there is a somewhat general taste and curiosity for knowledge about other people's affairs which has called into existence a class of newsgathering that is designed to gratify that taste without circulating falsehoods, and it is easy enough to see that mistakes may occur without any improper purpose, and in spite of care. But when the mistake does occur, and leads to mischief, the party injured cannot be called upon to suffer for the public amusement or entertainment.

Any one, whether reporter or otherwise, who undertakes to give to the public the contents of a document which speaks for itself, and in which he has no personal concern, is bound, if he would reduce his liability, to use such a degree of care as is reasonably sure to prevent mistake, and to publish nothing not so obtained, which will inure to the injury of another. There can be no different standard applied to reporters than to others, and the rule laid down by the court that such care as reporters generally use is the standard, is not a correct rule. It may be true that they are usually careful; and in *Tryon v. Association*, 39 Mich. 636, it was held libelous to charge a reporter with violating confidence, as having a direct tendency to injure him in his calling. Any rule which should put the press and its managers on a less honorable footing would lessen public confidence, and help nobody. But their work in such matters is not privileged.

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The subject of relative responsibility was recently considered in *Bronson v. Bruce*, 59 Mich. 467 (26 N. W. Rep. 671), and it was held that all persons must be treated as alike responsible.

There was a reference in the opinion below to the plaintiff, as not living with his family, as a consideration to be taken into view in dealing with the reporter's knowledge; and such reference was made to it on the argument in this Court as to indicate that stress may have been laid on it improperly, and with a wider bearing. There was nothing to indicate that the reporter's action or acquaintance with plaintiff could have been in any way affected by this fact. The only evidence on the subject indicated that plaintiff was unfortunate enough to have an insane wife. How this could be allowed to operate to his prejudice or affect his standing we cannot see.

While there is a good deal more that is open to criticism on the record, it is evident that the view taken of the legislation upon newspapers colored the entire case. The questions presented have been dealt with so often in this Court that we cannot suppose the circuit judge meant to disregard our rulings. When it is understood that the case is governed by the rules heretofore applied in similar cases, there is not much more that needs to be suggested. It cannot be claimed that the article was not libelous. Neither can it be claimed, even under the statute, that a retraction removes the liability. The law as to mitigation has been very fully settled already.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

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THE RICHELIEU & ONTARIO NAVIGATION COMPANY v. THE THAMES & MERSEY MARINE INSURANCE COMPANY.

[See 58 Mich. 132.]

Marine insurance—Abandonment—Notice—Acceptance—Liability of insurer.

1. An abandonment once made and accepted fixes the rights of the parties, and renders the insurers liable as for a total loss.
2. Where, upon receiving notice of the abandonment of a vessel by the owners, the insurers take her in charge, put her in the dry-dock, and cause her to be repaired at an expense exceeding one-half of her value, and do not return, or offer to return, the vessel to the owners, these acts amount to an acceptance, and the title passes to the insurers.
3. On receiving notice of abandonment, the insurers have a right to refuse acceptance until they make inquiry into the cause of the accident, and if it was occasioned by any peril not insured against, or by neglect of parties having the vessel in charge for the owners, or because of her unseaworthiness, or of other causes excepted in the policy, their liability will not attach; but they cannot accept the vessel and defer these inquiries until after suit is brought, and then for the first time set up a claim that their acceptance is not conclusive.
4. A notice that an insured vessel is ashore at a stated place, and that the owners abandon the boat and claim a total loss, with request to the agent to whom the notice is directed to inform the underwriters, is a sufficient notice of abandonment.
5. By the well-established principles of marine insurance a deed of abandonment is not essential to the rights of either party, as the title passes, and the property vests in the insurer, immediately on abandonment. No particular form of notice is necessary, and, unless required by the policy, it need not be in writing. *Trans. Co. v. Ins. Co.*, 59 Mich. 228, 229.

Error to Wayne. (Reilly, J.) Argued June 20, 1888. Decided November 28, 1888.

Assumpsit on marine insurance policy. Defendant

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brings error. Affirmed. The facts are stated in the opinion.

Maynard & Swan, for appellant, contended:

1. The telegram states no cause for abandonment. This it must do; citing *Bullard v. Ins. Co.*, 1 Curt. C. C. 148; *McConochie v. Ins. Co.*, 26 N. Y. 477.
2. As to when the right to abandon arises, counsel cited 2 Pars. Mar. Ins. 181, 182, 584; *Bosley v. Ins. Co.*, 3 Gill & J. 450; *Wood v. Ins. Co.*, 6 Mass. 479; *Patrick v. Ins. Co.*, 11 Johns. 9; *Kaltenbach v. Mackenzie*, L. R. 3 C. P. Div. 476.
3. The secretary of a corporation has not, as such, the authority to abandon, and no person can do so who has not the power to make a legal transfer of the property; citing 2 Pars. Mar. Ins. 119.
4. The defendant's agents had the right to send and pay for the expedition which rescued the vessel, without running the risk of being held to have accepted the abandonment; citing *Trans. Co. v. Ins. Co.*, 59 Mich. 282.
5. The agent's statements or assumptions are not evidence of the existence of his authority; citing *Kornemann v. Monaghan*, 24 Mich. 36; *Reynolds v. Ins. Co.*, 36 Id. 131, 141; *Hirshfield v. Waldron*, 54 Id. 651.
6. While, as a rule, acceptance of an abandonment is irrevocable, this is true only when it is made with knowledge of the facts; citing 2 Pars. Mar. Ins. 349, 350; even though one party led the other into mistake, without fraud; citing 2 Phil. Ins. § 1817; and an adjustment is not binding if in any degree it proceeds on mistake; citing *Steel v. Lacy*, 3 Taunt. 285; *Faugier v. Hallett*, 2 Johns. Cas. 233; *Reyner v. Hall*, 4 Taunt. 725; *Stuart v. Sears*, 119 Mass. 145; and the insurer may even pay the loss, yet if he does this under mistake, and without knowledge of the facts which would defeat the claim of the insured under the policy, his right to recover the amount from the insured is clear; citing *Johnson v. Ins. Co.*, 39 Mich. 33; 2 Phil. Ins. § 997; *DeHahn v. Hartley*, 1 Term Rep. 343; *Ins. Co. v. Walsh*, 18 Mo. 229.

Moore v. Canfield, for plaintiff, contended:

1. This notice of abandonment was held sufficient on the former hearing.
2. The record shows a constructive acceptance of the abandonment by the defendant, and it is therefore liable to pay as for a total loss without regard to the extent of the damages suffered by the steamer, or whether the loss was occasioned by a peril insured

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against; citing 2 Phil. Ins. 391, 392, 394, 400; 2 Pars. Mar. Ins. 177; 2 Arnould, Ins. 993, 1057, 1185; 2 Greenl. Ev. § 392; Barber, Ins. § 144; and acceptance may be implied from the acts of underwriters; citing 2 Phil. Ins. § 1692; *Badger v. Ins. Co*, 23 Pick. 355; *Peele v. Ins. Co.*, 3 Mason, 81; *Peele v. Ins. Co.*, 7 Pick. 254; *Reynolds v. Ins. Co.*, 22 Id 191; 2 Arnould, Ins. 1174; *Trans. Co. v. Ins. Co.*, 59 Mich. 214; *Copelin v. Ins. Co.*, 9 Wall. 461; *Norton v. Ins. Co.*, 16 Ill. 235; *Ins. Co. v. Bakewell*, 4 B. Mon. 541; *Trans. Co. v. Ins. Co.*, 24 Fed. Rep. 171; *Copelin v. Ins. Co.*, 46 Mo. 211; *Marmaud v. Melledge*, 123 Mass. 173.

LONG, J. This is an action of *assumpsit* on a policy of marine insurance. The case has been once heard in this Court, and is reported in 58 Mich. 132 (24 N. W. Rep. 547).

On the former trial the defendant in the court below based its defense simply upon the ground that no action could be maintained by the plaintiff, because the policy declared that it was issued "on account of the Owen Sound Steam-ship Company," and the circuit court so ruled, and a judgment was entered in favor of the defendant, which was reversed by this Court, and the case remanded for new trial. In the present trial the plaintiff had a verdict and judgment for the full amount of its claim, and the defendant brings the case into this Court by writ of error.

On the trial it appeared that the plaintiff was the owner of the steamer Spartan, and in the spring of 1883 she was chartered for the period of three years to the Owen Sound Steam-ship Company, one of the terms of the agreement being that the charterers should keep the steamer insured for the benefit of the owner. Under this agreement the charterers caused her to be insured in several companies, among whom was the defendant, who issued a policy in the sum of $7,500, dated April 21, 1883, and under which it insured the steamer against the perils of the Great Lakes and other connecting waters, from May 1 to November 30, 1883.

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Under the charter, the Owen Sound Steam-ship Company assumed the exclusive possession of the steamer, and appointed or hired her officers and crew. The policy, in terms, was issued—

"On account of the Owen Sound Steam-ship Company; loss, if any, payable to the Richelieu & Ontario Navigation Company."

Soon after taking possession of the steamer, at Lachine, near Montreal, the charterers brought her to Owen Sound, and put her upon their regular route between that port and Fort William, on the north shore of Lake Superior. After having made three trips on this route, the steamer, while on a voyage from Fort William to Owen Sound, was stranded, in the night-time, upon a reef near Caribou island, in Lake Superior.

Upon receiving notice of the disaster, and believing that the steamer was likely to prove a total loss, the owner gave notice of abandonment to the defendant, who sent a wrecking expedition to her relief, and succeeded in getting her off, and brought her to Detroit, a port foreign to her owner, where she was repaired.

The valuation of the steamer, as stated in the policy, was $50,000. The limit of insurance was $40,000. The policy further provided:

"Touching the adventures and perils which the said insurance company are content to bear and take upon themselves by this policy, they are of the lakes, rivers, canals, fires, jettisons, that shall come to the damage of said vessel, or any part thereof, excepting all perils, losses, misfortunes, or expenses consequent upon and arising from or caused by the following or other legally excluded causes, viz.:

"Damage that may be done by the vessel hereby insured to any other vessel or property; incompetency of the master; or insufficiency of the crew, or want of ordinary care and skill in navigating said vessel, and in loading, stowing, and securing the cargo of said vessel; rottenness,

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inherent defects, overloading, and all other unseaworthiness; theft, barratry, or robbery; charges, damages, or loss in consequence of a seizure or detention for or on account of any illicit or prohibited trade, or any trade in articles contraband of war; any claim for wages or provisions furnished to officers or crew while the property insured may be detained by any disaster or during subsequent repairs, excepting, always, services rendered in protecting, recovering, and securing the vessel or property covered by this policy," etc.

The policy also contains the following provision:

"It is agreed that the acts of the insured or the insurers, or their agents, in recovering, saving, and preserving the property insured in case of disaster, shall not be considered a waiver or an acceptance of an abandonment, nor as affirming or denying any liability under this policy, but such acts shall be considered as done for the benefit of all concerned, and without prejudice to the rights of either party.

"Further, the insured shall not have a right to abandon the vessel in any case unless the amount which the insurers would be liable to pay under an adjustment as of a partial loss shall exceed half the amount insured, nor shall detention by the season or by any other cause be alleged or allowed as cause for abandonment. Moreover, no abandonment, in any case whatever, and even when the right to abandon may exist, shall be held or allowed as effectual or valid unless it shall be in writing, signed by the insured, and delivered to the said company or to their authorized agent, nor unless it shall be efficient, if accepted, to convey to and to vest in said insurance company an unincumbered and perfect title to the subject abandoned," etc.

Upon the trial the plaintiff, to maintain the issue upon its part, introduced in evidence the policy of insurance declared upon, and offered proofs tending to show that plaintiff was a Canadian corporation, and owner of the steamer Spartan, described in the policy. For the purpose of showing the abandonment claimed plaintiff introduced in evidence the following telegram:

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MONTREAL, June 26, 1883.

"To CHARLES PERRY, Insurance Agent: Spartan ashore on Caribou island, and this company begs to inform you that they abandon the boat, and claim total loss. Please inform the underwriters.

"J. N. BEAUDRY,
"Secretary R. &. O. Nav. Co."

Plaintiff also introduced in evidence, in connection with such telegram, the following letter written by Charles Perry to Crosby & Dimick, the general agents of defendant at Buffalo, N. Y., and which letter inclosed such telegram to them:

"MONTREAL, June 26, 1883.

"CROSBY & DIMICK,
"Buffalo, N. Y.

"*Gentlemen:* The enclosed message received from Montreal *in re* Spartan. I think they are rather premature, as no word has been received from the steamer as to her position.

"Yours truly,
"CHARLES PERRY.

"P. S. Since writing the foregoing I have seen a letter just received from Owen Sound. One of the men from the Spartan came down by steamer this morning to the Sault, and reports that the damage done to the Spartan is not, so far as could be seen, of a serious character. She is stranded on the south-west corner of the shoal. In running on she broke her suction-pipe in doing so, which, as a matter of course, allowed her to fill with water. She has about eight feet of water in the hold, and stood the storm very well. The passengers remain on board. She don't seem to pound on the bottom, and expect that the tugs Winslow and Leviathan have her off before this."

Plaintiff read the testimony of Charles Perry, who signed the foregoing letter, and who testified substantially that he lived at Toronto, and secured the policy sued on from Crosby & Dimick, defendant's general agents; that he was not the agent of defendant, but made the application for the insurance, and sent it to Buffalo; that

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Elliott, of the Owen Sound Steam-ship Company, asked for the insurance, and witness was paid for his services in obtaining the risk by the general agents of defendant, Crosby & Dimick, and that he insured the vessel with Crosby & Dimick, from whom he received the policy; that witness' name was indorsed on the policy when he received it as "Charles Perry, Agent," and was written in Crosby & Dimick's office, as was also the policy; that he asked Elliott to insure the vessel, and had authority from Crosby & Dimick to solicit insurance for defendant.

Plaintiffs also called Stephen B. Grummond as a witness, who testified that he was the owner of the tug Winslow, and was in 1883, and that he sent that tug under command of Capt. Swain, in June, 1883, with a wrecking outfit, to rescue the steamer Spartan; that he was employed by Crosby & Dimick, defendant's agents, to send the expedition, and knew of the Winslow bringing the Spartan to Detroit; that Crosby & Dimick paid him for the Winslow's services in rescuing the Spartan.

Martin Swain testified that he commanded the tug Winslow, and in June, 1883, rescued the Spartan from the west shore of Caribou island, and brought her to Detroit, and turned her over to the Detroit Dry-dock Company.

Alexander McVittie testified in behalf of plaintiff that he was, in 1883, secretary of the Detroit Dry-dock Company; that that company did work on the steamer Spartan in the summer of 1883; that he had a conversation with Capt. Crosby, of the firm of Crosby & Dimick, in regard to repairing the Spartan; that Crosby wanted the dry-dock company to make a bid for repairing the Spartan for a specific sum, which it declined to do; that the company did not make any arrangements for doing the work;

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that Crosby wanted a first-class job, and the work done right; that the dry-dock company did the work, and Mr. Gibson, of Buffalo, was the general superintendent; and that the dry-dock company got its pay for the work out of the district court in admiralty.

Plaintiff then called Samuel Gibson as a witness, who testified substantially that he resided in Buffalo, and is a ship-builder; that, in July, 1883, Lorenzo Dimick, of the firm of Crosby & Dimick, of Buffalo, sent for him, and asked if he would go to Detroit and hold a survey on a vessel, which was then in a dry-dock of Detroit, meaning the Spartan.

"He said he had received a notice of this boat being abandoned to the insurers, and wanted me to go up and see how badly she was used up, and I started that night for Detroit."

Witness further testified that he held a survey with Frank E. Kirby; that he saw the captain, and told him he came up to represent the insurance companies in making survey, and that he did represent the insurers; that after the survey he negotiated with Kirby, of the Detroit Dry-dock Company, with regard to the repairs of the Spartan, and agreed upon the work to be done and the materials to be furnished, but not upon the price; that he wanted Kirby to take the contract to repair the steamer; that Kirby would not do the work by contract, but offered to do it by day's work; that he saw Crosby three days after the survey at the dry-dock. The matter of repairing the Spartan was then talked over by Crosby, Kirby, McVittie, and the foreman of the yard. Witness then told Crosby that Kirby and he could not agree, and Crosby told witness to go along as best he could with surveying and repairing the Spartan; to use his own judgment. Crosby said:

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"We will have to repair it. If we don't do it by the job we have got to do it by the day. That she would have to be gotten out of the dry-dock, or they would charge us like Sam Hill."

Witness was then asked:

"*Q.* What did Crosby say to you about making arrangements with the dry-dock company about day work?

"*A.* He said: 'Go ahead. Do the best you can.' He left the whole business with me. Crosby told me to do it any way, and said, 'The boat is all broken up, and I have got to do something with it.'"

Witness, continuing, said:

"I arranged with Kirby to do the work by the day. I returned to Buffalo, and saw Dimick. I told Dimick that the dry-dock company would not take the contract; that the boat was all stripped. The bottom I started by the day's work. He said: 'All right. I want to hire you. What will you charge to go up there and look after the work? Those people will have a fair bill against us,'—or something to that effect. He wanted to have somebody to watch it. I made a bargain with Dimick to superintend the repairs, and superintended the work most of the time, reporting to Crosby and Dimick every week. * * * I told Dimick the cost of repairs would exceed the survey. I think I put a price of $15,000 on all the work on the survey, or $18,000. Kirby would not agree to that. I told Dimick the cost would exceed $6,000 or $7,000 more than the survey. Dimick got mad and damned the boat, and then said: 'You have got to get along, and get it done. She has got to be fixed.'"

Plaintiff then gave evidence tending to show that there was no person present during the time the repairs were going on authorized to represent the owner in making repairs. Plaintiff then rested its case.

Counsel for defendant then offered in evidence the proofs of loss and protest, for the purpose of showing how the loss occurred, and in connection therewith offered to show—

1. That the Spartan was lost by reason of perils not insured against.

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2. That the vessel was lost by unseaworthiness.

3. That she was lost by want of ordinary care and skill in her navigation, in that she was run in violation of the laws of Canada; that she should run at a moderate rate of speed in a fog; she was run without a lookout, and without soundings being taken; and generally to show the conditions under which that loss was caused.

The court ruled that, as the plaintiff had rested the case entirely upon the acceptance of the abandonment of the vessel, the defendant, before showing the conditions under which the loss was caused, should first produce some evidence tending to negative the acceptance of the abandonment. Some proofs were so offered, and the defendant was then permitted to show the manner in which it claimed the disaster happened.

Proofs were offered by plaintiff in rebuttal of defendant's theory of the cause of the disaster, but plaintiff insisted, and now insists, that the proofs show an abandonment to defendant as a total loss and an acceptance thereof by it. Upon this question the court charged the jury as follows:

"Upon the first question, was there an abandonment and acceptance of the same by the defendant? I charge you that, if you believe from the evidence in this case that defendant received notice of the abandonment from plaintiff,—and upon that point there can be no dispute among you, because notice of the abandonment was sent to the defendant,—and thereafter they got the steamer off, and brought her to Detroit, and caused her to be repaired without consulting the plaintiff, and failed to tender her back to the plaintiff, or any one representing it, then this would amount to a constructive acceptance of the abandonment, and plaintiff is entitled to recover, irrespective of what the cause of the stranding was."

The court further instructed the jury as follows:

"As aiding your judgment, evidence has been submitted to you as to the stranding of the steamer Spartan and her course at the time of the accident, as to the condition of the weather, the rate of speed at which she was

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going, the manner in which she was officered and equipped, and the kind of a compass she carried, the length of time she had carried this compass, other trips she had made with this compass, a general description of the steamer, and the trade she was in. The plaintiff contends that the steamer was lost by stranding accidentally on Caribou island, on June 19, 1883. Defendant claims that the stranding and consequent loss was attributable to the negligence of the master and the unseaworthiness of the steamer.

"These are questions for you to consider and determine between the parties. I cannot say to you as a matter of law that the speed of the steamer at the time of the accident was negligence, or that the absence of a lookout was in itself negligence, or that the condition of the compass showed negligence. I leave those to you to determine from all the evidence in the case. You have heard the testimony as to the length of time the compass had been in use, the trips that had been made with it, the manner in which it acted, and the opinion of experts as to the compass, and the opinion of experts as to the other facts,—the running of the steamboat in this weather, and as to the lookout. From this evidence, and all the evidence in the case, you are to determine whether the steamer was lost through the negligence of those navigating her, or her unseaworthiness, and, if she was, the plaintiff cannot recover, and your verdict should be for the defendant.

"But if you find that she was seaworthy when she started upon the voyage upon which she was lost, and that she was not lost through the negligence of those in charge of her, your verdict should be for the plaintiff.

"Defendant has asked me to charge you that, if the defendant or its agent had no information of the fact that the Spartan was running at full speed in a dense fog, and without a lookout, when she was stranded, defendant did not waive its right to contest the liability for a loss by efforts to ascertain the extent of the damage, or even by giving orders to repair the same, if it did so, believing the loss was caused by a peril insured against; nor did the insurer, by such efforts or orders, in ignorance of the cause of the loss, irrevocably accept the alleged abandonment of said steamer. That I will give you with these modifications:

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"If you believe that the conduct of the defendant—and when I say defendant I mean the firm of Crosby & Dimick, its general agents—amounted to an acceptance of the abandonment, and if they took charge of the repairs, and had them done, and failed to return her, that was an acceptance; but if they afterwards learned the facts just referred to in this request, and determined to contest their liability upon the ground of negligence and unseaworthiness, then they should have so notified the plaintiff, and not have allowed the plaintiff to rest under the supposition that the abandonment was accepted. If you believe, after learning these facts, they remained quiet, giving the plaintiff no notice, so the plaintiff might have taken steps to have the steamer repaired or not, as it thought best, the defendant did waive its right to contest the liability upon the ground of negligence and unseaworthiness.

"As I have stated, plaintiff seeks to recover, first, upon the ground of an abandonment of the vessel to the insurer, and the acceptance of the same by the defendant. If you find that, it will not be necessary for you to determine whether the damage to the vessel exceeded 50 per cent. of the cost. If it did exceed 50 per cent. of the cost, then the plaintiff had the right to abandon the steamer as a constructive total loss. Therefore, if you do not find for the plaintiff on the first proposition, it will be necessary for you to determine before you reach the second consideration whether the vessel was lost by stranding, and whether the damage to the vessel amounted to 50 per cent. of her value. If it did not amount to 50 per cent. of her value, then the plaintiff is not entitled to claim her as a constructive total loss."

At the close of the charge, the court, at the request of the plaintiff, submitted the following special questions to the jury:

"1. Did the owners of the Spartan, after she was stranded, abandon her to the insurers?

"*A.* Yes.

"2. Did the insurers, after receiving notice of the abandonment, get her off, and bring her to Detroit?

"*A.* Yes.

"3. Did the insurers, after the Spartan was placed in dry-dock, cause her to be repaired?

"*A.* Yes.

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"4. Did the insurers, after the repairs were made, return the Spartan to her owners, or offer to do so?
"*A.* No."

Defendant's counsel requested the court to submit the following special questions to the jury for their finding:

"1. Was the Spartan stranded while running at full speed, without a lookout, in a dense fog?
"2. Is a steamer on Lake Superior, running 12 miles an hour, without a lookout, in a dense fog, navigated with ordinary care and skill?
"3. Would not ordinary care and skill, and a good compass, have enabled the Spartan to clear Caribou island?
"4. Did Captain Crosby, in directing strict supervision to be kept of the repairs put on the steamer, intend to accept an abandonment of the Spartan?
"5. Did not Captain McGregor order Captain Swain to take the Spartan to Detroit for repairs? And was she not put in dry-dock by Captain McGregor's orders?"

These special questions of defendant's the court refused to submit to the jury, except the first, upon which the court remarked:

"There is no evidence that this vessel had a lookout in the sense of its being the duty of one particular man on the vessel to keep a lookout. The evidence tends to show that the man on watch, the captain or mate, acted as lookout. In the captain's watch it was the second mate. The officer of the deck had charge of the vessel, and acted as lookout; but there is no evidence in the case that there was a special officer whose duty it was to act as lookout, and I suppose you should answer that question in accordance with the testimony in the case, that there was no special lookout other than the mate. * * * I will refuse the balance of the questions."

The jury returned no answer to this special question. Verdict and judgment passed for the plaintiff for the full amount of insurance claimed. Defendant removes the case to this Court by writ of error.

Ninety-nine errors are assigned. It would be fruitless for us to take up and discuss these several assignments

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of error, except in a general way. We have carefully read the testimony, the claims made by the respective parties, the charge of the court, and the findings of the jury, and from the whole record we are of the opinion that the verdict and judgment must stand. The charge of the court is more favorable to the defendant than we think it entitled to. The jury have found specifically that the owners abandoned the steamer to the insurers; that, after receiving notice of the abandonment, the insurers got her off, and brought her to Detroit; that they placed her in dry-dock, and caused her to be repaired; and that they did not return, or offer to return, her to the owners.

It is claimed, however, by defendant that, admitting all these facts to be proven, yet, if it was done in ignorance on the part of the insurers as to cause of the loss, and believing that the loss was occasioned by one of the perils insured against, when in fact the loss was occasioned by perils not insured against, which facts did not come to the attention of the insurers until after the repairs were made, and acceptance of abandonment under such circumstances would not be conclusive upon the defendant, and it would have a right to open the whole controversy, and inquire into the cause of the loss; and if it did occur by perils not insured against, or by the negligence of the parties having her in charge, or by unseaworthiness, these facts would defeat the plaintiff's right of recovery.

We cannot agree with the counsel in this view. An abandonment once made and accepted fixes the rights of the parties, and renders the insurers liable as for a total loss. Here was written notice, signed by the owners, that they abandon her to the insurers. It is received by the insurers. They act upon it, take the vessel in charge, put her in dry-dock, cause her to be repaired at great

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expense, and retain possession. They do not return, or offer to return, her to the owners. These acts amount to an acceptance. The title of the vessel passes to the insurers under such circumstances. The insurers had the right to refuse acceptance until they made inquiry into the cause of the accident, and if it was occasioned by any peril not insured against, or by the neglect of parties having her in charge for the owners, or her unseaworthiness, or other causes excepted in the policy, and if these facts were found to exist, liability would not attach; but it cannot be said that the insurers may do all the acts found to have been done by them in this case, without inquiry as to the cause of the accident, make repairs to an amount exceeding 50 per cent. of the value of the vessel, fail to return her, and make no offer of return, and, when an action is brought upon the policy, then for the first time set up a claim that the acceptance is not conclusive, and be permitted to make the inquiries as to the cause of the accident they should have made before performing all these acts, which amount to an acceptance.

It was held by this Court on the former hearing that the form of the notice of abandonment was sufficient. 58 Mich. 132 (24 N. W. Rep. 547).

In *Northwestern Trans. Co. v. Ins. Co.*, 59 Mich. 228, 229 (26 N. W. Rep. 336), this Court said:

"By the well-established principles of marine insurance a deed of abandonment is not essential to the rights of either party, as the title passes, and the property vests in the insurer, immediately on abandonment. No particular form is necessary, and, unless required by the policy, it need not be in writing."

The record shows that the notice of abandonment was not only received, but was acted on by the insurance company without objection, and they cannot now be

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heard to complain as to its form or sufficiency. We think there was sufficient evidence to go to the jury of an acceptance of the abandonment, and that there was an acceptance by the acts of the defendant, and it is too late for it to recede. It became the owner because of the acceptance, and is therefore liable as for a total loss. We need not discuss the other questions, as this must be conclusive of the rights of the parties.

The judgment of the court below must be affirmed, with costs.

The other Justices concurred.

WILLIAM W. DENNIS, ASSIGNEE OF THE HOLMES LUMBER COMPANY, v. JOHN C. LEATON, ALBERT B. UPTON, ET AL.

Contract—Failure to deliver lumber—Lien—Equity—Damages.

This case involves the alleged failure of defendants Leaton and Upton to perform a contract for the manufacture and sale of lumber, which performance was secured by a lien upon the lumber, and the Court find such breach, and decree that said defendants shall pay to complainant the difference between the contract price of the lumber sawed and the cost of replacing it. The case is one purely of fact, and reference is had to the opinion for further amplification of the facts.

Appeal from Wayne. (Chambers, J.) Argued June 21, 1888. Decided November 28, 1888.

Bill to cancel certain acceptances, and to assess complainant's damages for the non-performance of a sawing contract. Complainant appeals. Decree reversed, and one entered as stated in head-note. The facts are stated in the opinion.

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H. M. Campbell, for complainant, contended:

1. Complainant is a new party, who is himself entitled to all the relief and to the benefit of the old suit; citing Jennison, Ch. Pr. 353; 2 Dan. Ch. Pr. 1546; Milf. & Ty. Eq. Pl. 170; Story, Eq. Pl. § 353; 2 Barb. Ch. Pr. 86.
2. The lien under the contract, will be enforced by a sale of the property; citing 2 Story, Eq. Jur. §§ 1216–1220; *Glidden v. Norvell,* 44 Mich. 202.
3. The court, having cognizance of the case to cancel the acceptances, will retain the case and assess the damages; citing *Carroll v. Rice,* Walk. Ch. 373; *Brown v. Gardner,* Harr. Ch. 291; *Whipple v. Farrar,* 3 Mich. 446; *Teft v. Stewart,* 31 Id. 367; *Miller v. Stepper,* 32 Id. 194; *Folkerts v. Powers,* 42 Id. 283; *Railway Co. v. Railroad Co.,* 63 Id. 645.
4. The measure of damages is the difference between the contract price and the cost of replacing the lumber at the time the delivery should have been made; citing *Haskell v. Hunter,* 23 Mich. 305; *McKercher v. Curtis,* 35 Id. 478; *Chadwick v. Butler,* 28 Id. 349; *Bates v. Stansell,* 19 Id. 91.

Wisner & Draper, for complainant, filed a brief, which is confined to a discussion of the testimony.

Dodds Brothers (*I. A. Fancher* and *Benton Hanchett,* of counsel), for defendants Leaton and Upton, contended:

1. The representations as to the solvency of the Holmes Lumber Co., which were false, were a fraud upon defendants, which entitled them to cancel or refuse to perform the contract; citing 2 Pars. Cont. (6th ed.) 767, 770, 785, 786; *Converse v. Blumrich,* 14 Mich. 123; *Jewett v. Petit,* 4 Id. 508; *Newell v. Randall,* 50 Am. Rep. 562; and the change in the contract did not affect this right, unless it is shown that they knew of the fraud when the change was made; citing Kerr, Fraud & Mis. 299–302.
2. The defendants were justified in refusing to proceed further with the contract; citing *Hosmer v. Wilson,* 7 Mich. 304; and neither the Holmes Lumber Co. nor the complainant, who simply takes its rights, can assert any rights under it, thus claiming advantages resulting from their own fraud; citing *Barnes v. Brown,* 32 Mich. 153; 1 Story, Eq. Jur. (12th ed.) § 64 *e*; 2 Pars. Cont. 782.
3. The delivery up of the acceptances was not necessary in order to cancel the contract; citing *Dayton v. Monroe,* 47 Mich 198;

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Hanold v. Bacon, 36 Id. 1; *Frost v. Lowry*, 15 Ohio, 200; *Martin v. Roberts*, 5 Cush. 126.

4. The contract covers only the lumber from the logs specified, whether more or less than 4,000,000 feet in amount; citing *Switzer v. Mfg. Co.*, 59 Mich. 496.

5. The measure of damages is the difference between the contract price and cost of lumber of the same quality and quantity, to be determined by the price at which such lumber could be bought in the market at wholesale, or, if it could not be obtained at wholesale, then at retail; citing *Haskell v. Hunter*, 23 Mich. 309.

MORSE, J. The Holmes Lumber Company, in 1885, was a corporation organized under the laws of this State, and doing business at Detroit. January 5, 1885, said company entered into an agreement with the firm of Leaton & Upton, composed of the defendants John C. Leaton and Albert B. Upton, and located at Mt. Pleasant, in Isabella county, in this State. This agreement, as originally made, in substance provided:

1. That Leaton & Upton are to sell to the Holmes Lumber Company 4,000,000 feet of lumber, to be manufactured at their mill by July 1, 1885, out of certain logs; the lumber to be piled on their yard, and loaded on the cars as the lumber company direct.

2. The price of the lumber is fixed according to certain 11 grades into which it is to be assorted.

3. The lumber company are to buy the lumber, and direct and accept delivery on board of cars, and pay by furnishing on the 5th of each month acceptances of two-thirds of the purchase price of all lumber cut and piled the previous month, and payable in Detroit 90 days from date, and be taken up by the proceeds of the lumber when shipped. If shipments are not made fast enough to take up the paper as it falls due, they shall be renewed from time to time until the shipments will take them up. After all such paper is paid, the remaining shipments to be settled for monthly by paper at 90 days, payable at Detroit.

4. As fast as cut the lumber to be assorted and piled in grades by an assorter to be agreed upon, who was to furnish monthly statements of the amount and grades of

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lumber, and the acceptances were to be given upon such statements. When loaded on the cars the lumber was to be inspected, and the lumber paid for according to that inspection.

5. In case the Holmes Lumber Company become dissatisfied with the assorter or inspector, a new one was to be chosen by arbitration.

6. As fast as the lumber was assorted and piled, it was to be marked with the lumber company's mark, and the company was to have a lien on the lumber to secure the faithful performance of the contract.

7. Leaton & Upton were to keep the lumber at all times insured, in companies to be approved by the second party, for an amount equal to the advances upon it, which shall run to the party of the second part, as its interest may appear.

8. If at any time the mill of the parties of the first part shall be destroyed by fire, or otherwise injured, so as to prevent its running, or if they shall be unable, on account of strikes of railroad employés, to ship their logs over the railroad to their mill, or strikes of mill-men, the time for sawing said lumber shall be extended for such reasonable time, not to exceed 90 days, as may be necessary to rebuild or repair said mill, or to ship said logs, or hire new men.

The parties began to operate under this contract soon after it was made. On April 8, 1885, the third clause was changed so as to make the acceptances payable at the Commercial Bank of Mt. Pleasant, and to be taken up by the proceeds of the lumber when shipped. On each car-load, when shipped, Leaton & Upton were to make a sight draft, payable to the order of the Commercial Bank, which bank was to be responsible for the application of the sight drafts upon the acceptances, and until the payment of such draft Leaton & Upton were to have a lien upon such car-load for its payment. After all acceptances advanced were paid, sight drafts were to continue to be made on the shipments, deducting 2 per cent. from the contract price of the lumber. The acceptances were to be renewed until the shipments would pay them.

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The Holmes Lumber Company agreed to ship two-thirds of the lumber by January 1, 1886, and the balance by June 1, 1886.

Under the original contract, and as modified, estimates or reports of the lumber sawed and piled were made, and acceptances advanced for each month's sawing, except for the amount cut in June, 1885, for which Leaton & Upton refused to make a draft.

On July 7, 1885, Leaton & Upton wrote the lumber company as follows:

"To THE HOLMES LUMBER CO. (Incorporated),
"Detroit, Mich.

"*Gentlemen:* You have breached the contract between us which bears date Jan'y 5, 1885. We therefore hereby advise you that we consider and shall treat the same as canceled.

"Yours truly,
"LEATON & UPTON."

At this time something over $10,000 of acceptances were out. Leaton & Upton refused to deliver up or cancel these acceptances, or to deliver any lumber. The Holmes Lumber Company never received any lumber upon this contract, although it presented an order for shipment.

Leaton & Upton refused absolutely to perform the contract, and thereupon the Holmes Lumber Company filed its bill of complaint in the Wayne circuit court, in chancery, for the purpose of having surrendered up and canceled the acceptances, for which it had received nothing, to assess its damages resulting from the failure of Leaton & Upton to perform the contract, and satisfy the same by enforcing the lien upon the lumber provided by the contract. The bill averred the insolvency of Leaton & Upton, and prayed for an injunction restraining them from disposing of the lumber and acceptances. Upon the filing of the bill a preliminary injunction as prayed was

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granted. Afterwards the defendants surrendred the acceptances, and, upon their filing a bond in the sum of $5,000 to pay any decree which might be rendered against them, by stipulation of counsel, the injunction was dissolved.

After the cause was at issue the Holmes Lumber Company made a general assignment for the benefit of its creditors. William W. Dennis, the assignee, filed the present bill in the nature of a bill of revivor and supplement, upon which the proofs were taken and hearing had. Hon. F. H. Chambers, who heard the case, entered a decree dismissing the bill of complaint, from which the complainant appeals to this Court.

The Commercial Bank of Mt. Pleasant was made a defendant because, before the commencement of the suit, Leaton & Upton had assigned their interest in the contract to said bank, and also in April, 1885, it had taken an assignment of the interest of said Leaton & Upton in the lumber and logs cut and to be cut under the contract. By the release, however, of the lumber, and the execution of the $5,000 bond, as the case now stands, the bank has no particular interest in this litigation.

We have carefully examined the proofs in the case, and are satisfied that the decree of the court below must be reversed. The evidence shows that Leaton & Upton, as we think, without cause, deliberately refused to perform their contract. Therefore the complainant is entitled to a decree for damages for the non-performance of the contract.

The defendants seek to avoid their liability upon three grounds.

First, they claim that the contract was procured by fraud, through the representations of Hugh A. Holmes, president of the corporation, that the Holmes Lumber Company was worth from $80,000 to $100,000, over and above their liabilities, and that their paper was first-class,

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and was readily current in Detroit at 7 per cent. discount at the banks; that said lumber company was mixed up in none other than the lumber business; that Leaton & Upton relied on these statements, and the credit of said company as so represented, and were thereby induced to make the contract; that these representations proved to be false; that, in fact, the Holmes Lumber Company was not responsible, and its paper could not be discounted on their credit, in Detroit or elsewhere.

That in March, 1885, Morris Holmes, vice-president of the company, stated that the company, three years before, was dealing in options, and failed, and was running on a very small capital. On learning of this statement of said Morris Holmes, they inquired of its truth of Hugh A. Holmes, who denied it. They claim that it was necessary that they should be enabled to float these acceptances in order to obtain money to get out the logs, and this was known to Hugh A. Holmes, who negotiated the contract on behalf of the company.

We are not satisfied from the testimony that Hugh A. Holmes ever made any representation that the company was worth $80,000 to $100,000, and we are convinced that the company was in good financial standing all the time from the making of the contract to the date of the refusal of the defendants to perform it, and that their paper could have been readily discounted during that time in Detroit at 7 per cent. Four leading bankers of Detroit, among them David Preston and Mr. Wendell, testify that the standing of the company was good, that they met their paper promptly, and large discounts were made on the strength of the financial reputation of the company. There is no evidence that previous to their assignment the paper of this company was ever protested, or failed to be promptly taken care of and met when due. Leaton and Upton both admitted that they knew of no

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instance of the failure of the company to promptly meet its obligations. And while this contract was in existence, and when they knew of some of the facts upon which they now base a claim of fraud, they sold this company, outside of the contract, some $3,000 worth of lumber on credit, upon 90-day acceptances, which acceptances were promptly paid as they fell due. Upton also admits that at the time negotiations were going on as to the contract he was referred by Hugh A. Holmes to the commercial agencies, and that he went to Dun's agency, in Detroit, in April, 1885, and was there informed that their financial reputation was good, and that they met their paper promptly.

It is urged that the fact of their assignment is sufficient proof of the irresponsibility of the company, and of the fraud charged. We do not think so. The assignment was not made until December 22, 1885, and was caused by the failure of the firm of M. Hyatt & Co. The Holmes Lumber Company was indorser upon about $30,000 of their paper, received by the company in payment of lumber sold to Hyatt & Co., and which had been discounted. The assignment was made to protect the other creditors of the company. There is no reason to believe that Leaton & Upton would have lost anything by non-payment if they had performed their contract. They would probably have received their pay in full for all the lumber shipped.

The fact that they subsequently sold this lumber to Crosby & Collins for about five dollars per thousand above the contract price, and that lumber that season was being sold on a rising market, seems to furnish the best reason why the defendants refused to fulfill their agreement.

There is another significant fact to be considered.

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After Leaton & Upton, as they claim, discovered this fraud upon them, instead of canceling the agreement then and there, they modified it. After they learned what Morris Holmes had stated about the Holmes Lumber Company dealing in options, one or both of the defendants went down to Detroit. Mr. Upton also testifies that he undertook to negotiate some of the paper, inquired at the Detroit National Bank if he could place the paper there, and the cashier told him, "No." He also inquired of some parties as to the responsibility of the lumber company, and was informed that its standing was not good.

W. N. Brown, vice-president of the Commercial Bank of Mt. Pleasant, also testifies that he tried to discount one of the company's acceptances at several banks in Detroit, and could not do so; and that he learned from several parties, although he did not inquire at the commercial agencies, that the company had no financial standing in Detroit. One McCabe also testifies to the same effect. The result of these endeavors and inquiries were known to both Leaton & Upton before the change in the contract of April 8. It would seem that the proper time to have refused performance of the contract would have been at once, upon the heels of these inquiries; but, instead of doing so, the contract is recognized and renewed by the change in the third clause heretofore noted.

The defendants claim in explanation of this action that they then informed Mr. Hugh A. Holmes of what Morris Holmes had stated as to the dealing of the company in options, and told him that if they learned that the representations as to the financial standing and worth of the company were untrue, they should cancel the contract. Hugh A. Holmes admits that they told him what they

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had learned Morris had stated, but says that he stated to them that it was false. He denies that either one of the defendants, at or before the amendment to the contract, said that, if they ascertained that the statement of Morris as to their dealing in options was true, or if the company proved to be not worth $80,000, they would cancel the contract. No statement that they would cancel the contract, and no threat that they would cancel it, on the happening of any event, was ever made by either of the defendants.

He further testifies that after the 8th of April no complaint was ever made by the defendants of any difficulty in discounting the paper of the company, nor any hint given that the contract was not being fully performed on the part of the complainant corporation, and it does not appear in the evidence that either of the defendants ever made complaint during the existence of the contract, either to Mr. Hugh A. Holmes, or any other member of the company, that they could not float the paper of the company in Detroit.

There is also reason to believe from the testimony that the change made in the third clause was desired by the defendants, in order that they might discount the paper at Mt. Pleasant, and help them in their dealings with the Commercial Bank there. It will also be noticed that in the letter of July 7 no fraud is claimed in the inception of the agreement, but simply a claim that the company has "breached" it. The claim of fraud cannot successfully be maintained, either in this respect or in the employment of Sherman to grade the lumber, which is made the defendants' *second* ground of defense.

Sherman was recommended by the company, and accepted by defendants, to grade the lumber as it came from the mill, in the beginning of the sawing under the contract. The defendants contended in the court below, and gave

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evidence tending to show, that Sherman was entirely unknown to them; that Hugh A. Holmes procured their assent to Sherman's employment by stating that he was a stranger to him, but was well recommended; that in fact Sherman had worked for the lumber company before, and in his work, when defendants were not by, fraudulently assorted the lumber in favor of the company.

This charge of fraud on the part of Sherman is not sustained, in our opinion, by the evidence. No complaint was ever made to the company that Sherman was doing his work unfairly; and when the defendants sold lumber outside of this agreement, to the Holmes Lumber Company, they agreed upon Sherman as the inspector, and, according to Upton's testimony, he was kept assorting the lumber a long time after they knew he was grading it unfairly, and six weeks working with another man, whom the defendants now claim was selected to take his place, because they were dissatisfied with Sherman.

The *third* defense is that the lumber company violated the contract because, in its letter of July 2, submitting the statement of the inspector for the month of June, showing the *whole* amount of the lumber sawed and piled to be $22,637.69, the company, in asking the defendants to make their draft for its acceptance for $4,932.50, the balance of two-thirds of that amount, over and above the acceptances before made, also required that such draft should be accompanied by insurance running to the company for the amount of $15,091.79. The defendants claim that they had made a verbal agreement with one Bennett, an agent of the company at Mt. Pleasant, and who was looking after the company's interest at the mill, that the insurance obtained upon the lumber should be in favor of the Commercial Bank, which discounted the acceptances. Bennett denies that he ever made any arrangement with the defendants that the insurance might

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run to the bank, and not to the company. The only thing he consented to was that it might run in favor of both of them, as their interest might appear. It is also shown that he had no authority to make the agreement in relation to insurance, as claimed by the defendants. Also that H. M. Campbell, the attorney of the Holmes Lumber Company, of date June 16, 1885, wrote both to the defendants Leaton & Upton and to the Commercial Bank, insisting that insurance be effected on the full amount of the lumber sawed, in favor of the company, according to the terms of the written agreement. These letters were not answered or returned.

The company was not notified that Bennett had made any different arrangement. And in the letter of July 7, of defendants, no claim is made that there is anything wrong about the demand for insurance. If this claim for insurance was the breach of the contract, as is claimed in the argument in this Court, why did not the defendants tender the draft, without insurance, for the acceptance of the company, stating the agreement with Bennett? This, it seems to me, would have been the natural way of doing business. It hardly can be claimed that a contract is violated by merely claiming more performance than it requires, unless the performance required is tendered and refused. If one owes another $100, he will not be excused from the payment of it for no other reason than that the creditor demands more than $100.

Looking the evidence all over, and giving due weight to the claims of the defendants, it is clear to my mind that Leaton & Upton had no possible excuse for refusing to perform their contract. It may be that they so refused because they feared that the company was financially unsound, and might ship all the lumber, and dispose of it without paying them for it. This is one of the reasons assigned for their refusal. But they had no legal justifi-

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cation of any such fear from what appears in this record.

The question of the amount of the damages is not easy to be determined from the testimony. We think, however, that the amount of lumber to which the company was entitled should be confined to the amount sawed. This seems to be all the lumber furnished by the logs mentioned in the contract, according to the testimony of the defendants, which is not disputed. The inspector's statement shows that there was sawed at the time of the cancellation of the contract 2,187,442 feet. After that defendants sawed from the logs specifically named in the contract 600,000 or 700,000 feet, according to the testimony of the defendants. Calling it 600,000, would make the total amount 2,787,442 feet. The contract price averaged $11.39 per thousand feet. As near as we can gather from the testimony, it would have cost the lumber company at least $13.50 per thousand to have replaced this lumber, obtaining it as fast as they could in the market after the breach of the contract. In December the defendants sold it for $16.50, but there is testimony that lumber had risen in price in the fall. We think the difference between $13.50 and $11.39 per thousand an equitable basis for the computation of damages. This amounts to $5,881.50.

A decree will be entered in this Court reversing the decree in the court below, and for the payment by the defendants Leaton and Upton to the complainant of the sum of $5,881.50, with interest from July 7, 1885, to the date of such decree, with costs of both courts to the complainant.

The other Justices concurred.

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76	573
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74	117
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92	544
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104	227

JULIUS KING OPTICAL COMPANY v. JOHN E. TREAT.

Sale—Credit—Burden of proof—Evidence—Notice to produce letters.

1. Where the fact of a sale of goods was not disputed, but the controversy was as to its terms, the testimony of the agent who made the sale that he sold the goods to the defendant for a price named is not incompetent as stating a conclusion of law.
2. A notice to produce letters to be used as evidence on a trial, which are in the possession of the client in another state, and to procure which required that they be forwarded by the next mail after the receipt of telegram to mail them, is unreasonably short.
3. A question calculated to raise improbabilities in favor of the party asking it is proper.
4. In a case involving a sale of goods claimed by the defendant to have been made on time, which was denied by the plaintiff, evidence of the financial standing of the defendant at or about the time of the sale is admissible.
5. Where a letter written by the defendant to the plaintiff, and relating to the subject-matter of the suit, is offered in evidence by the plaintiff, upon which appears an unsigned memorandum not so relating, and not written by the defendant, and the author or purpose of which does not appear, the memorandum is no part of the letter, and immaterial as evidence in the case.
6. Where the sale and delivery of goods is undisputed, but the contest is over the terms, the vendor claiming it to have been for cash and the vendee upon credit, proof of such sale and delivery raises a presumption that the sale was for cash, and the burden is upon the vendee to establish the contrary.

Error to St. Joseph. (Loveridge, J.) Argued October 3, 1888. Decided November 28, 1888.

Assumpsit. Plaintiffs bring error. Reversed. The facts are stated in the opinion.

S. M. Constantine (*W. G. Howard,* of counsel), for appellants.

H. O. Bliss and *Dallas Boudeman,* for defendant.

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SHERWOOD, C. J. This action is *assumpsit*, commenced by attachment on the ground of fraud in the sale of a bill of goods by the plaintiffs to the defendant. The cause was tried by jury, and the defendant had judgment in his favor. Defendant claimed that he bought the bill of goods on four months' time, and the plaintiffs claimed they were sold for cash; that the goods were sold to defendant on March 15, 1887; and that the bill thereof amounted to $419.40.

Upon the trial the agent who sold the goods, when upon the stand, testified that he sold them to the defendant for the price named. This testimony was stricken out by the court, on motion of defendant's counsel, as being no statement of fact, but a conclusion of law.

The testimony should have been allowed to stand. The sale was not contested. The terms thereof were the principal question in controversy. Very many statements of facts involve questions of law, and when the conclusion involves all the facts sought, and necessarily follows therefrom, then such question is proper, as in this case.

The statement of the plaintiffs' agent that the defendant selected the goods from the samples shown was unobjectionable, and should have been admitted when offered by plaintiffs' witness.

The plaintiffs' third objection is without merit, and was properly overruled. It was immaterial how the bill of goods ordered in the present case compared with other orders previously made by the defendant, and the ruling to that effect was correct.

The fourth objection related to the written order which was made for the goods; but the record shows no ruling upon the objection, and we therefore cannot consider it.

Under the fifth objection it does not appear what the counsel wished or desired to show by the witness. Until this appeared the court was not advised of its competency

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or relevancy, and it was therefore immaterial what the desire of the witness was in the matter. There was no error in this ruling.[1]

The sixth alleged error is that the defendant's attorney, after the plaintiffs rested, offered to introduce in evidence copies of certain letters, upon the claim that they were material, and that he had demanded the originals, and given the plaintiffs a reasonable length of time to produce them. The copies were objected to on the ground that the notice to produce the originals was too indefinite, and that reasonable time for their production had not been given. It appears from the record that there was but bare time enough to produce them from Ohio, where they were, in the next mail, after being called for by telegram. While I think the notice was not sufficiently definite, it calling for all the letters which passed between the parties, or their agents, between certain dates, relating to the matter of the sale of the goods, still, if this were not so, the time was unreasonably short, and the copies should have been excluded; but as the contents of the copies of the letters nowhere appear in the record, we are unable to say prejudicial error was committed in receiving them. It certainly is not shown, and therefore we are not required to take notice of it.

The seventh and eighth objections have been considered in discussing the other errors assigned.

The ninth error alleged was not discussed on the argument before us, and need not be further mentioned here.

The plaintiffs' tenth assignment is on the objection to the following question propounded to the defendant when upon the stand:

[1] The question objected to was, "Is there anything you wish to state as to what his brother said to you, in his presence, about these goods?"

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"When did you buy as large an order before?"

The objection was immateriality and irrelevancy, and was sustained. It was claimed by plaintiffs' counsel that the purchase of so large an order on time, by a dealer in so small a town as Three Rivers, when his stock was not worth over $3,000, was highly improbable, and that the evidence was proper to go to the jury. The question was one calculated to raise improbabilities in favor of the plaintiffs, and should have been received.

The plaintiffs offered to show the financial condition of the defendant at or about the time the goods were sold to him, as bearing upon the improbabilities of giving time upon the purchase of the bill of goods in question, and the testimony was refused. We think it should have been allowed. Sales are not usually made to irresponsible parties on long time, and the tendency of the testimony was for the plaintiff.

The thirteenth assignment of error was not well taken. The question asks what the defendant expected or would expect under certain circumstances in regard to plaintiffs giving time on the order. The question was immaterial. What the defendant did and said in regard to this matter was important, but what he thought about it was of little consequence one way or the other.

The fourteenth and fifteenth assignments were not argued, and are unimportant.

The plaintiffs introduced in evidence a letter from defendant to plaintiffs, dated February 7, 1887. Upon the margin of this letter was a memorandum, reading: "I think you can catch this man at any time." This was not written by defendant, and nobody appears to know by whom it was written, or by whose direction, and there was no proof of the purpose. Defendant offered it in evidence. The plaintiffs' counsel objected to it as immaterial. It was no part of the letter, and was clearly

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subject to the objection made. Its use as evidence was mischievous.

The seventeenth assignment has already been sufficiently considered, and the eighteenth was not argued.

The nineteenth assignment of error is to the charge of the court, to the effect that the bill for the goods was due when suit was commenced, and that this fact must be found by a preponderance of the proofs. So far as related to the proofs made by witnesses before the jury this charge was erroneous. The sale and delivery of the goods were substantially admitted by the defendant. The terms of payment were alone controverted. The proof of sale and delivery raised the presumption that the sale was for cash, and the burden was upon the defendant to show that the terms were otherwise, and the jury should have been so informed by the court, and, if the defendant failed to show the terms otherwise, the plaintiff should have recovered.

Further consideration of the case is unnecessary. For the errors pointed out the judgment must be reversed, and new trial granted.

The other Justices concurred.

HENRY A. RENSENHOUSE v. ISAAC W. SEELEY.

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Mutual benefit associations—Foreign corporations—Right to carry on business in Michigan—Life insurance.

1. How. Stat. § 4225, was not intended to nor does it apply to co-operative and mutual benefit associations.
2. Mutual benefit and co-operative associations, whether corporations or mere voluntary associations, are, strictly speaking, insur-

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ance organizations, whenever, in consideration of periodical contributions, they engage to pay the member or his designated beneficiary a benefit upon the happening of a specified contingency.

3. An insurance contract is an agreement by which one party, for a consideration, promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest.

4. In this case it is held that the "Fraternal Alliance," an Illinois corporation organized to establish a secret order, which shall cultivate social and fraternal relations among its members, and furnish aid to those of them that may become sick or disabled, but no annual dues or premiums to be required, and all aid and assistance to be by voluntary subscription, comes within the exception of section 25 of Act No. 187, Laws of 1887, and has a right to do business in this State without being in any manner under the control of the Commissioner of Insurance.

Error to St. Joseph. (Loveridge, J.) Argued October 3, 1888. Decided November 28, 1888.

Assumpsit under How. Stat. § 4225. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

S. M. Constantine (*W. G. Howard*, of counsel), for appellant.

Dallas Boudeman, for defendant.

[The controlling questions in this case are fully discussed in the opinion, and, as they involve the construction of the various statutes cited, their restatement from the briefs of counsel is omitted.—REPORTER.]

LONG, J. This is an action of *assumpsit* brought under section 4225, How. Stat., to recover money paid defendant as agent of the Fraternal Alliance, a corporation organized under the laws of the state of Illinois.

Suit was commenced by summons before a justice of the peace of St. Joseph county. The declaration was on the common counts in *assumpsit*. Plea, general issue,

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with notice of special matters of defense. Plaintiff recovered judgment in a justice's court. Defendant appealed to the circuit court for St. Joseph county, where the cause was tried before the court without a jury, and defendant had judgment for costs.

On the trial the court found the following facts and conclusions of law:

"1. That the Fraternal Alliance is a corporation organized under the laws of the state of Illinois, and that it was so organized on or about the 30th day of September, A. D. 1885, and is located in the city of Chicago and county of Cook.

"2. That the charter or articles of association of said corporation declare that the object for which it is formed is to establish a secret order, which shall cultivate social and fraternal relations among its members, and furnish aid to those of them that may become sick or disabled; no annual dues or premiums to be required, and all aid and assistance to be by voluntary contributions.

"3. That said association proceeded to organize a supreme body under such charter, known as the 'Supreme Council of the Fraternal Alliance,' a social order, and adopted a constitution and by-laws for its government.

"4. That said association entered upon its use and exercise of its privileges, and has continued to use and exercise them, receiving initiation fees and dues, and paying losses and benefits.

"5. That on or about the 15th day of June, 1886, by virtue of said association and supreme council, at Chicago, a subordinate council, known as 'No. 32,' was organized at Three Rivers, in said county of St. Joseph, with a membership at one time of about 90 persons, among whom were the plaintiff and defendant in this suit; that said council No. 32 was organized by the appointment of a chairman, a deputy, and a board of managers; that the defendant was such deputy, and as such it was his duty to secure members of said Fraternal Alliance order, and to receive and remit to the said association at Chicago the monthly dues or voluntary contributions of the members, and one dollar of each initiation fee; of the remaining four dollars of such initiation fee, one dollar was to be paid to the examining surgeon, and three dollars retained by the deputy for his services.

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"6. That on the 29th day of September, 1886, the plaintiff became a member of said Council No. 32, and of said order of Fraternal Alliance, and received a certificate of membership, which recited, among other things, that in consideration of a voluntary contribution of one and 50 one-hundredths dollars to the funds of said order, to be made on or before the 25th day of each and every month during the continuance of this membership, Henry Augustus Rensenhouse shall, after the expiration of sixty days from the date of this certificate, when temporarily disabled from prosecuting his usual vocation by reason of sickness or disability, be entitled to receive from the benefit fund of the order a weekly benefit of twelve and 50 one-hundredths dollars. The certificate contains a further provision that, in the case of the death of the plaintiff, the wife may continue to make voluntary contributions, for the purpose of participating in the equalization of benefits at the end of seven years, or in lieu thereof receive, within fifteen days after furnishing proof of death, the amount contributed by said member to the benefit fund of the order, less the amount of benefits received by him.

"7. That the plaintiff paid to the defendant, as deputy or agent of said association, an initiation fee of $5.00, and his monthly dues for nine months, from the 25th day of October, 1886, to the 25th of June, 1887, of one and 50 one-hundredths dollars each month, a receipt being given at the time of each monthly payment of dues in form following, viz.:

"Received of H. A. Rensenhouse, Council No. 32, certificate No. 819, one and 50 one-hundredths dollars, as his voluntary contribution to the funds of the order of the Fraternal Alliance for the month of October, 1886.

"H. B. CHANDLER, Secretary.

"I. W. SEELEY, Deputy."

"8. That said Fraternal Alliance deposited the moneys paid to it for dues and other voluntary contributions with the Corn Exchange Bank of Chicago, and that the defendant remitted to said bank the dues received by him from said plaintiff, and such part of the membership fee not retained by him for the purposes above stated.

"9. That at the time of the commencement of this suit the said Fraternal Alliance was doing business in the State of Michigan, but not by virtue of or under any

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authority granted or issued to it by the Commissioner of Insurance of said State, and at the time the said money was paid by the plaintiff to the defendant, and before this suit was commenced, the treasurer of the State of Michigan had no deposit from the said Fraternal Alliance, as is contemplated by section 4225, How. Stat.

"That after the formation of said corporation, the Fraternal Alliance, the officers thereof applied to the Commissioner of Insurance aforesaid for license or permission to do business in this State, if he deemed it such a company as required a license or permission, and said Commissioner never granted any license or permission, alleging as a reason that he did not consider it to be such a corporation as was required, under the laws of this State, to have any license or permission granted.

"10. This action was brought to recover the money paid by the plaintiff to the defendant for his voluntary contribution or monthly dues to the Fraternal Alliance, and the amount paid by him to become a member thereof, in all the sum of eighteen and 50 one-hundredths dollars."

Conclusions of law:

"1. That the said Fraternal Alliance is not a life insurance company, within the meaning of section 4225, How. Stat., in requiring a deposit of $100,000 securities with the State Treasurer, nor is it an insurance company, within the designation of section 4244 of said statutes, and amendments thereof, requiring a like deposit.

"2. The moneys paid by the plaintiff, which he now seeks to recover, were voluntary contributions or payments made by him as a member of the order of the Fraternal Alliance to the defendant as a member and officer of such association, and he cannot maintain this action to recover them back.

"3. The defendant should have judgment against the plaintiff for his proper costs and charges."

Judgment was entered in said court on the above findings, on February 27, 1888. Afterwards, and on March 20, 1888, the said court, on the request of counsel for defendant, made the following as an additional finding in the cause:

"The Fraternal Alliance is a fraternal society, which

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is under the supervision of a supreme body, and furnishes relief to its members by the payment to them of weekly sums while they are disabled, by reason of sickness, from carrying on their usual business; and that it neither pays any commissions nor employs any paid agents, the moneys which are paid by its members as a membership fee being the only money used for the payment of its medical examiners, solicitors, and others engaged in the management of its business; that said Fraternal Alliance is not incorporated under any act of this State."

Exceptions were filed to these findings. Plaintiff brings the case to this Court by writ of error.

It appears that in September, 1885, this corporation was formed under the laws of the state of Illinois. The management of its affairs is placed in a board of seven directors, and its object, as stated in its articles, is—

"To establish a secret order, which shall cultivate social and fraternal relations among its members, and furnish aid to those of them that may become sick or disabled; no annual dues or premiums to be required, and all aid and assistance to be by voluntary contribution."

It is contended by defendant's counsel that this company is not an insurance company, within the statutes of this State, but that it is a fraternal order, and chartered as such under the laws of the state of Illinois, and that its business is carried on in accordance with its charter, and the plan set forth in its constitution and by-laws, and the certificate of membership; that the object of the association is not speculative, but social and benevolent in its relations, furnishing aid to those that may become sick or disabled, and that only indirectly does it pay a death loss.

The only important question involved in the controversy is, is it, in effect, a life insurance company, within the meaning of chapter 131 of Howell's Statute? Section 4225 of said chapter 131 reads as follows:

"No company organized or existing under any author-

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ity whatsoever, other than the statutes of this State, shall be at liberty to transact the business of life insurance within this State until such company, in addition to the requirements now made by law, shall have deposited with the State Treasurer one hundred thousand dollars of the like securities required to be deposited by companies formed under this act, which shall be held as security for any losses," etc.

This section further provides, however, that companies having deposits in other states for the protection of policy-holders, etc., may be licensed to transact business of life insurance within this State on the production of the certificate from the proper officer of such state, etc. This section also inflicts a penalty for taking insurance before such deposits are made, or such license granted on the certificate from the foreign state. This section further provides:

"And any person who shall have paid, to any agent of such company, any premium moneys before such securities are deposited, shall be entitled to recover the same back from such agent, or, at his option, from the company, by action of *assumpsit*, to be brought at any time within six years after such payment."

Section 4244 of said chapter 131 defines life insurance as follows:

"That all corporations, associations, partnerships, or individuals, doing business in this State, under any charter, compact, agreement, or statute of this or any other state, involving an insurance, guaranty, contract, or pledge for the payment of annuities or endowments, or for the payment of moneys to families, or representatives of policy or certificate holders or members, shall be considered and deemed to be life insurance companies, within the meaning of the laws relating to life insurance within this State," etc.

Section 4246 of said chapter excepts mutual benefit, co-operative, and other benevolent associations organized or to be organized within this State, under and by virtue

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of the provisions of an act entitled "An act to provide for the incorporation of co-operative and mutual benefit associations," approved April 3, 1869.

It is not claimed, however, that this company is organized under, or comes within, the provisions of section 4246. But by section 27 of Act. No. 187, Laws of 1887, section 4246 was made applicable to all mutual benefit and co-operative associations, whether organized under the laws of this State, or in some foreign state or foreign country. If it is an insurance company, coming within the definition given by the Legislature under section 4244, above quoted, it is not protected by the provisions of section 4246, as the exceptions therein contained relate solely to associations organized or to be organized within this State under the provisions of the act of 1869, but is protected by the amendment of 1887, above referred to.

At the legislative session of 1883, however, an act was passed—

"Authorizing foreign co-operative corporations or associations to transact business in this State." Act No. 181, Laws of 1883.

Section 1 of this act provides—

"That any corporation or association organized, or that may hereafter be organized, under the laws of any other state, to insure lives on the assessment plan, or any corporation or association so organized, carrying on the business of life or accident insurance on the assessment plan, shall be licensed by the Commissioner of Insurance upon payment to him, for the benefit of the State, a fee of twenty-five dollars, to do business in this State."

This section further provides that such corporation shall first deposit with the Commissioner of Insurance a certified copy of its charter or articles of incorporation, a statement of its business for the preceding year, etc., and satisfy the Commissioner that it has the ability to pay

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the beneficiaries of the members its policies or certificates to the full limit named therein, etc.

Section 2 provides that, upon complying with the provisions of section 1 of this act, the Commissioner shall issue to such corporation a certificate of authority to do business in this State.

Section 5 of the act, among other things, provides:

"This act shall not be construed so as to apply to any secret or fraternal society, lodge, council, or association, now doing business in this State, which is under the supervision of a grand or supreme body, and furnishes insurance to its members, but neither pays any commissions, nor employs any paid agents, whether organized under the laws of this or any other state; but such secret or fraternal societies, lodges, councils, or associations, now doing business in this State, shall be authorized to transact business in this State, and not be subject to the provisions of this or any other act."

Under this act, while some penalties are attached for doing business within the State without having first complied with the provisions of the act, and obtaining the certificate of the Commissioner of Insurance, yet no provision is made for collecting by suit or otherwise from the company or its agents the moneys paid for such insurance.

At the legislative session of 1887, a general revision of the law relative to co-operative and mutual benefit associations was made. This act is entitled—

"An act to revise the laws providing for the incorporation of co-operative and mutual benefit associations, and to define the powers and duties and regulate the transactions of the business of all such corporations and associations doing business within this State." Act No. 187, Laws of 1887.

The first 16 sections of the act relate solely to corporations or associations organized under the act, the manner of their organization and right to do business, etc. Sec-

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tion 17 of the act contains substantially the same provisions as are embodied in section 1 of the act of 1883, with some modifications and additions. Section 18 provides for a payment of a fee of $25 to the State, and authorizes the Commissioner of Insurance to issue the certificate to such association authorizing it to do business within this State. Section 25 provides:

"This act shall not be construed to apply to secret or fraternal societies, lodges, or councils now doing business, or that may be hereafter organized, in this State, which are or shall be under the supervision of a grand or supreme body, and secure members through the lodge system exclusively, nor to any association organized solely for benevolent purposes, composed wholly of the members of one occupation, profession, or religious denomination, or fraternal society, their wives or widows, now organized and doing business in this State."

It is evident that section 4225, How. Stat., above quoted, was not intended to apply, and does not apply, to co-operative and mutual benefit associations. This section has reference to that class of life insurance companies that are organized outside of this State, and doing business herein, not on the co-operative or mutual benefit plan, and relates solely to those companies that are required under the same section to deposit $100,000 with the State Treasurer as a guaranty of payment, and a protection to their policy holders; and the recovery of the premiums paid, either from the company or agent, is authorized under this section only when the money is received by the agent or company "before such securities are deposited."

A right of recovery is also given against the company or agent for such moneys paid by the provisions of section 4244, above quoted. This section first defines what corporations, companies, associations, etc., shall be considered life insurance companies, within the meaning of the laws relating to life insurance within this State; and requires

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that no such insurance, guaranty, contract, or pledge, etc., shall be made which shall not distinctly state therein the amount of such life benefits, the manner of the payment, the period of the continuance thereof, and the amount of the annual, semi-annual, or quarterly premium, or by which the payment of the life benefit assured shall be contingent upon the payment of assessments made upon surviving members, and not until the securities required of life insurance companies are deposited, nor except in accordance with and under the conditions and restrictions of the statutes now or hereafter regulating the business of life insurance. This section then provides for penalties for soliciting insurance before such conditions are complied with, and provides for recovery in *assumpsit* for the moneys so paid, either from the company or agent, the same as is provided in section 4225. This section is aimed at the form of the policy, as well as giving definition to the term "life insurance companies," and it is very evident it was not intended to effect co-operative and mutual benefit associations, or such companies or associations which are not required to deposit securities with the State Treasurer.

In 1869 the Legislature first authorized the incorporation of co-operative and mutual benefit associations in this State, and by Act No. 104, Laws of 1869, provided the manner of their incorporation, and defined their powers. At the same session the Legislature provided for the incorporation of life insurance companies within this State, defining their powers and duties. Act No. 77, Laws of 1869.

Section 22 of Act No. 77, provided for the recovery of the premium moneys paid from the company or agent, if such moneys were paid to a company not authorized to do business under this act. This act was amended in

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1871 by adding three new sections thereto, to stand as sections 27, 28, and 29. Act No. 80, Laws of 1871.

At the extra session of the Legislature in 1872, section 29 was amended, and now stands as section 4244, How. Stat. At the legislative session of 1877, an act was passed—

"To facilitate the organization of mutual benefit and co-operative associations within this State." Act No. 29, Laws of 1877.

It is provided by this act that the act of 1869, and the amendments of 1871 and 1872, shall not be construed so as to include, apply to, or in any wise affect mutual benefit, co-operative, and other benevolent associations, organized or to be organized within this State under the act of 1869.

As we have already seen, section 4225 of Howell's Statutes was not intended to and does not apply to mutual and co-operative associations organized under any law of this State. By Act No. 29, Laws of 1877, it is expressly provided that section 4244 shall not include, apply to, or in any way affect mutual benefit and co-operative associations, organized within this State.

By Act No. 181, Laws of 1883, foreign co-operative corporations and associations were authorized and empowered to do business within this State by the payment of a fee of $25, and filing with the Commissioner of Insurance copies of their articles of incorporation, etc., as before stated. By this act foreign co-operative associations were placed on the same footing as domestic ones, so far as their right to do business in this State is concerned. The act further provides that it should not be construed to apply to secret or fraternal societies, lodges, councils, or associations, now doing business in this State, which are under the supervision of a grand or supreme

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body, and furnish insurance to members, but neither pay any commissions. nor employ any paid agents, whether organized under the laws of this or any other state; but such secret or fraternal societies, lodges, councils, or associations, now doing business in this State, shall be authorized to transact business in this State, and not be subject to this or any other act.

The act of 1887, above cited, and from which I have quoted certain sections and paragraphs, revised these different acts from 1869 to 1877, and the amendments thereof, relating to mutual benefit and co-operative associations, as well as the act of 1883, and repeals all acts inconsistent with it, except in so far as they apply to societies and organizations mentioned in section 25 of the act. This exception refers to secret and other societies, under the supervision of a grand or supreme body.

It will be observed from a reading of these statutes that the Legislature of this State recognize several separate and distinct classes of companies or associations as permitted, upon certain conditions, to do life insurance business within this State:

1. Insurance companies organized and existing under the laws of this State.

2. Insurance companies organized under the laws of some other state or territory, or some foreign country, which, upon making deposit of $100,000 in securities, etc., and complying with certain other requirements, may, by obtaining the license or permission from the Commissioner of Insurance, do business within this State.

3. Co-operative and mutual benefit associations organized and existing under the laws of this State.

4. Co-operative and mutual benefit associations organized and existing under the laws of some other state or territory, or some foreign country, which, upon the payment of a fee of $25 to the State, and complying with certain other requirements, may, by obtaining the license or permission from the Commissioner of Insurance, do business within this State.

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5. Secret or fraternal societies, lodges, or councils which are or shall be under the supervision of a grand or supreme body, and secure members through the lodge system exclusively, and any association organized solely for benevolent purposes, composed wholly of members of one occupation, profession, or religious denomination, or fraternal society, their wives or widows, now organized and doing business in this State, are wholly exempt from the deposit of securities, the payment of the $25 fee to the State, and the other restrictions and conditions surrounding other corporations and associations, and these companies or societies may do business within this State wherever such societies may be organized, whether within or without this State, and they do not require the certificate or authority of the Commissioner of Insurance to do business within this State.

Even if the association in question in this case, called the "Fraternal Alliance," is an insurance company, it cannot come within the provisions of our statute relating to life insurance companies, either foreign or domestic, requiring the approval of the Commissioner of Insurance, unless it is included within the provisions of section 17 of the act of 1887. This association is under the supervision of a grand or supreme body, and secures its members through the lodge system exclusively.

An examination, however, of the charter and articles of incorporation, and the by-laws, shows that an application must first be presented for membership, in which the applicant must show that he is a good risk in life insurance. In order to join the association, the premium or membership fee of five dollars must be paid, and a medical examination is required. Periodical assessments are made, though they are called voluntary contributions. They are payable, according to the terms of the certificate, on the 25th day of each month, and in default of such payment the certificate of membership is forfeited. In case of accidental injuries or other disabilities, the member is paid a weekly amount during such disability, and

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at the death of the member proofs are to be made of such death, and the widow may continue payments and participate in benefits, or, in lieu thereof, receive his share of the funds, less benefits received by him during his life, and, should the member continue to live seven years, he receives a *pro rata* share of the funds unexpended for benefits.

It is true that the association has no salaried officers, but the deputy for each subordinate lodge receives five dollars as the membership fee, paying over to the use of the grand or supreme lodge one dollar, to the examining physician one dollar, and retains three dollars for his own services.

A majority, if not all, of the United States insurance companies, either home or foreign, are only allowed to do business upon compliance with specified conditions. In order, however, to encourage the formation of benefit societies, the advantages of which have been appreciated by legislatures, there is express provision in most, if not all, the states, for the organization of mutual benefit and co-operative associations. These associations, whether corporations or mere voluntary associations, are, strictly speaking, insurance organizations, whenever, in consideration of periodical contributions, they engage to pay the member or his designated beneficiary a benefit upon the happening of a specified contingency. Although they may also partake of the nature of fraternal societies, yet whether the benefit be paid for sickness, or to accumulate a fund out of which payments are to be made to beneficiaries of deceased members, the contract falls within the definition of an insurance contract. That is an agreement by which one party, for a consideration, promises to make a certain payment of money upon the destruction or injury of something in which the other party has

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an interest. *Com. v. Wetherbee*, 105 Mass. 149; *Association v. Com.*, 10 Penn. St. 357.

I think the case falls within the exception of section 25 of the Public Acts of 1887. This section is made more broad in its exceptions than the exceptions contained in the act of 1883. Section 25 of the act of 1887 excepts—

"All secret or fraternal societies, lodges, or councils * * * which are or shall be under the supervision of a grand or supreme body, and secure members through the lodge system exclusively."

Section 5 of the act of 1883 excepts all societies enumerated above in section 25, with the limitation, however, that it—

"Neither pays any commissions, nor employs any paid agents, whether organized under the laws of this or any other state."

While it may be treated as coming within the general definition of a life insurance company, and its objects and purposes may be to insure lives, as well as to aid its members in case of sickness or disability, yet the Legislature had the undoubted right to except secret or any other organizations from the general disabilities of the other class of life insurance companies within the State, whether such corporations or associations were organized within or without the State. It is a matter entirely for the Legislature to determine.

It is well settled that corporations of one state have no right to exercise their franchises in another state, except upon the assent of such other state, and upon such terms as may be imposed by the state where their business is to be done. Such conditions are absolutely within the control of the legislature. *People v. Howard*, 50 Mich.

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240 (15 N. W. Rep. 101); *Hartford Ins. Co. v. Raymond*, 70 Id. 485 (38 N. W. Rep. 714).

The Legislature has permitted this class of associations, whether organized under the laws of this State or elsewhere, to do business here, without reference to the certificate of the Commissioner of Insurance, or placing them in any manner under the control of the Commissioner. The exception in section 25 of the act of 1887 is broad enough to include the order of the Fraternal Alliance, and hence the plaintiff has no right of recovery.

The judgment of the court below is affirmed, with costs.

The other Justices concurred.

ELIZABETH STURGIS v. THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY.

Negligence—Railroad companies—Trespassers—Station grounds—Manner of ingress and egress.

1. It is impracticable to keep off trespassers from an open railway track, and all who go upon it do so on their own risk of such dangers as are incident directly to such use.
2. Under all the decisions made in this State on the subject, a railway company which has provided all reasonable facilities for ingress and egress from its station-houses has done its full duty in that regard, and cannot be bound to suppose that passengers who do not know the way will neglect the means open to their sight, and go off in the darkness somewhere else.

Error to Shiawassee. (Newton, J.) Argued October 4, 1888. Decided November 28, 1888.

Case. Defendant brings error. Reversed. The facts are stated in the opinion.

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E. W. Meddaugh, for appellant.

A. R. McBride and *Watson & Chapman,* for plaintiff, contended:

1. The statute does not contemplate that a railroad company shall maintain a cattle-guard between its depot and the nearest public highway, nor that it shall maintain a useless cattle-guard, as was this, since there was no fence from it to the depot on the north side of the track, and after the accident to plaintiff defendant filled up the pit, giving as a reason that it was dangerous to employés; citing *Railway Co. v. Campbell,* 47 Mich. 265.
2. The fact having been established that the defendant received and discharged its passengers over this route, it was its duty to keep it in a reasonably safe condition for such use; citing *Cross v. Railway Co.,* 69 Mich. 363; *McKone v. Railroad Co.,* 51 Id. 601; *Hulbert v. Railroad Co.,* 40 N. Y. 145; *Hoffman v. Railroad Co.,* 75 Id. 605.

CAMPBELL, J. Plaintiff fell into a cattle-guard at Durand, where defendant's railway crosses from the station grounds into the adjoining highway leading to the village, and was injured. She sued defendant for negligence, alleged to have consisted in leaving the pit open at the place in question, claiming that the railroad track was used as a foot-path, and that defendant was bound to keep it in safe traveling order.

Plaintiff had arrived with her husband on a train from Gaines to Durand, arriving after dark in the evening of December 1, 1885. She was not acquainted with the premises. Instead of going into the depot, which fronted on a highway on the other side from where she stepped from the cars upon the rear platform, and without making inquiry of any one, they went along the platform to where it ended with a step down upon the track in the station-yard, and then took the track, and walked along it in the direction taken by the train which they had left. There were no lights along the track after it passed the depot. The platform was about 270 feet long,

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and from the end of the platform to the cattle-guard was 445 feet further. The cattle-guard had no facilities for crossing, and does not appear to have been peculiar in its construction. There was a safe way from the front of the depot by the regular highway to the village, which, by reason of an angle, made the way thither rather longer than the straight line along the track to the cattle-guard on the highway. The way taken by plaintiff and her husband was all within the private grounds of the railway used for station purposes, and there were no walks or other means provided for pedestrians through this yard, and it was not lighted. The railway track was leveled and graded as usual in such places, and it was on this track, between the rails, and where all the trains ran, that plaintiff set out from the depot, and walked till she was hurt.

The declaration does not disclose the fact that the plaintiff walked along the track, but alleges that plaintiff took—

"The usual and only course of travel from said place [the depot] to the village of Durand, and was instructed by said defendant to go, and did go, along said railway company's ground until she had reached the main street of the village of Durand; this having been the custom of said company for the last seven years prior to said 30th day of November, 1885, to deliver its passengers at the place aforesaid, and then to permit, allow, and compel them to walk over the aforesaid course and ground to reach the highway in the village of Durand."

It then alleged it to be the duty of defendant to keep this ground in suitable and safe condition for passage, and charged that it wrongfully dug this pit, partly on its own ground and partly in the highway, where the public must pass over or around it in going to and from the highway to the depot, and left it uncovered, so that people frequently fell in, and that plaintiff, being ignorant

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of the surroundings, and following defendant's instructions, and going along the usual course of travel, met with the mishap complained of.

The court below practically told the jury that the facts relied on were not such as would authorize a recovery, but did not take the case from the jury, who gave a verdict for plaintiff of $1,000. The only error assigned is that the case was not taken directly from the jury.

There was no conflict in the evidence that the defendant had all necessary platform accommodations, with access to the only highway leading to the town. The only ground urged for plaintiff was that the railroad track was very generally used as a shorter cut from the village to the depot than was furnished by the regular road. So far as defendant's use of it is concerned, it was not shown to have differed in any way from that generally made of railroad tracks on railroad premises, and no other means of travel on it appeared than would be found on any such track. The company never took measures to light it, or to facilitate ingress and egress. The travel over it was just such as will be found anywhere along such tracks, which cannot be closed more effectually than by a cattle-guard. It is impracticable to keep off trespassers from an open track, and all who go upon it do so on their own risk of such dangers as are incident directly to such use. Under all the decisions made in this State on the subject, a company which has provided all reasonable facilities for ingress and egress from its station-houses has done its full duty in that regard. No company can be bound to suppose that passengers who do not know the way will neglect the means open to their sight, and go off in the darkness somewhere else.

The case made by the declaration relies upon positive action by the company, as well as elements of negligence, of which there was no testimony in the case whatever.

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But, aside from any questions of variance, we think no case was made out, and that the specific charges given were such that the jury could not have found the verdict they did without misunderstanding them.

The judgment must be reversed, with costs.

The other Justices concurred.

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ROBERT D. CHILD v. THE DETROIT MANUFACTURING COMPANY.

Contract of employment—Discharge of employé—Practice—Cross-examination—Pleading—General issue.

1. Facts relating to the matters given in evidence on the direct examination of a witness, and which have an important bearing upon the issue, may be shown on his cross-examination.
2. A defense which is confined to a refutation of the facts stated in the declaration, and necessary to be proved in order to enable the plaintiff to recover, may be made under the general issue.

Error to Wayne. (Reilly, J.) Argued October 4, 1888. Decided November 28, 1888.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the declaration.

Corliss, Andrus & Leete, for appellant, contended:

1. The incompetency of plaintiff, and his disobedience of orders, were questions of fact, and should have been submitted to the jury; citing Smith, Mast. & Serv. 151, 153; as should testimony tending to establish lack of diligence, as a ground for discharge; citing *Alberts v. Stearns,* 50 Mich. 350.
2. In this State the general issue in *assumpsit,* as a general rule, denies and puts in issue every fact, and every combination of

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facts, essential to the plaintiff's cause of action, and set up in his declaration; citing *Wilson v. Wagar*, 26 Mich. 452; *Snyder v. Willey*, 33 Id. 489; *Ingalls v. Eaton*, 25 Id. 32.

3. The only evidence offered to show authority for the execution of the contract sued upon was the statements of plaintiff that Mr. Christie, who signed it, was acting as secretary of defendant at the time. A corporation cannot be held to have contracted unless by such officers as have express authority; citing *Lockwood v. Boom Co.*, 42 Mich. 537; *Iron Mine v. Bank*, 44 Id 344.

4. A party dealing with the agent of a corporation must at his peril ascertain what authority the agent possesses, and is not at liberty to charge the corporation by relying upon the agent's assumption of authority; citing *McLellan v. File Works*, 56 Mich. 579; *Bank v. Corset Works*, 68 Id. 620; *Rice v. Club*, 52 Id. 90.

Bowen, Douglass & Whiting, for plaintiff, contended:

1. No evidence was admissible under the plea of the general issue except that plaintiff's exclusive time was not given to the business; citing Smith, Mast, & Serv. 170; *Speck v. Phillips*, 5 Mess. & W. 279; *Lush v. Russell*, 5 Exch. 203; and the decisions of this Court also sustain this rule; citing *Champlain v. Stamping Co.*, 68 Mich. 288.

2. The plea and notice should have informed plaintiff that the defense sought to be made was intended, so that he could have been prepared to meet it; citing *Rawlings v. Cole*, 67 Mich. 431.

3. In the absence of any provision to the contrary, it will be presumed that the president and treasurer of a corporation have the authority to make all necessary contracts in transacting its ordinary business; citing *Iron Works v. Bresnahan*, 60 Mich. 339.

SHERWOOD, C. J. The plaintiff entered into a written contract with the defendant for his services for one year, as traveling salesman, in selling a certain patent cooking crock, and other articles of the defendant's manufacture. The following is a copy of the written contract between the parties:

"DETROIT, MICH., April 18, 1887.

"MR. ROBERT D. CHILD,

"Baltimore, Md.

"*Dear Sir:* We desire to employ you as a traveling

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salesman for a period of one year from this date, at a salary of twenty-four hundred dollars ($2,400) per annum, payable semi-monthly, in amounts of $100 each. We also will allow your expenses on the road at such times as you are actually engaged in selling our goods or working under our directions. In consideration of the above salary and allowance for expenses you are to give us your exclusive time and services in the sale of our Excelsior Cooking Crock, and such other articles as we may manufacture or handle from time to time.

"Yours very truly,

'DETROIT MANUFACTURING CO.,

"Wm. V. Christie, as Treas.

"The above proposition is hereby approved and accepted.

"ROBERT D. CHILD."

The plaintiff's declaration contained a special count upon the contract, which, after stating the substance of the agreement, continued as follows:

"In pursuance of such contract, plaintiff entered into defendant's service on the 18th day of April, 1887, and continued to work for it, and perform his duties fully, and in all things conformed to the spirit and letter of said contract from said date, April 18, 1887, until on or about July 18, 1887.

"That on or about July 1, 1887, said defendant, without cause or provocation, discharged plaintiff from its services and employment, and refused to permit plaintiff to serve or work for it longer as its agent under said contract, and from further performing said contract on his part, although the plaintiff was ready and willing to continue to perform on his part to the end.

"And said defendant also refused (although repeatedly requested so to do) to pay plaintiff for the service then at said date already performed in his own behalf; and by reason of such breach on defendant's part plaintiff was thrown out of employment, and has been greatly damnified, to wit, in the sum of two thousand dollars."

The common counts in *assumpsit* were added.

Defendant, by its attorney, pleaded the general issue.

Trial was had before Judge Reilly, in the Wayne circuit, who directed a verdict for plaintiff for $1,046.25

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damages. A review on error is asked by the defendant.

The plaintiff was the only witness sworn on the part of the plaintiff. His testimony was to the effect that he resided in Baltimore, and had been, previous to making the contract, a traveling salesman several years; that he engaged to the defendant under the contract above referred to, and worked for it in making sales of the crocks in Baltimore, Philadelphia, and Wheeling, and gave his time exclusively to the business of selling the company's cooking crocks for defendant from the time he was employed until July 18, 1887, and held himself in readiness for the defendant's service until sometime in September following; that he was visited by an agent of the defendant in June, who told him to wait in Baltimore until the company should write him; and that the company did soon thereafter write him as follows:

"DETROIT, July 1, 1887.

"ROBERT D. CHILD,
"Baltimore, Md.

"*Dear Sir:* We desire to take advantage of your verbal agreement when you were here with us, viz., that, if you failed to sell crocks in paying quantities, you would vacate your position, thereby canceling our agreement with you. We see no prospect of your making your engagement with us pay, and we think, in the interest of all concerned, that it had better be terminated at once, leaving you free to place your services elsewhere, as we cannot employ them at any advantage to ourselves. We are perfectly willing to treat the matter in a spirit of equity and fairness, and if you are willing to meet us on the same ground, the matter can be easily adjusted without any feeling or unnecessary expense. Trusting your disposition is in accord with our own, and awaiting your early, we are, Yours truly,

"DETROIT MANUFACTURING CO.,
"Wm. V. Christie, Treas."

Plaintiff also gave in evidence his letter replying to the above, in which he said he denied the verbal agree-

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ment alluded to. Said he told defendant he thought he could sell 50,000 crocks during the year, when he made his contract of service, but did not guarantee to do so; that, if the crock was a selling article, he could sell as many as any man it could get; that he stood by his agreement, and would await a remittance of the amount due him, and that, unless received by the 11th of July, he should enter suit for what it owed him, and that he was willing to work, and could sell the company's crocks; that he was ordered to come to Baltimore, and to await instructions when to go and what to do.

He further testified he had never received any reply to his letter, and nothing from the company, and that he did not regard defendant's letter to him as a discharge from its service; that he did not make an effort to sell its goods only about two weeks after the 4th of July, and did not get another situation until about the 16th of February following, although he made an effort to do so; that from April 18 to June 7 he received from the defendant $400, of which $200 was for expenses; that he made sales of crocks before receiving defendant's letter, and none afterwards; that two of these were repudiated by the defendant, and that the third amounted to only about $70.

Upon the cross-examination of this witness the defendant sought to prove by him that when it employed the plaintiff he made false representations to defendant, and that, after he engaged in defendant's service, he refused to obey instructions of defendant; that plaintiff did not perform the defendant's work as in his contract he promised to do, and refused to obey the orders of the defendant, and offered the letters of plaintiff to show that fact; that the plaintiff did not work enough to earn his salary, and offered to show what he did do while in the employment of the defendant.

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Defendant's counsel offered to show further the pay plaintiff received from other parties while he claimed to have been in the employ of defendant under said contract.

This testimony was all ruled out by the circuit judge upon the objection of incompetency and immateriality. These matters were all proper to be given in evidence upon the cross-examination of the plaintiff. They all related to the matters given in evidence on his direct examination, and had an important bearing upon the issue. It was error to exclude them.

After the plaintiff rested his case, the defendant called to the witness stand William V. Christie, who testified that he was secretary of the defendant corporation, and, together with Mr. Paulison, its president, met the plaintiff, and gave him full directions how the goods were to be sold, and the method of conducting the business, and gave him specific instructions in regard thereto. Defendant then proposed to show the amount of goods plaintiff sold, and that he sold the same contrary to instructions; that he sold scarcely any goods; that he might have sold large quantities; that his work was not done according to agreement, and as he had promised, and was by reason thereof worthless to the defendant. This testimony offered was objected to.

We think this all should have been allowed. It was responsive to the case made by the plaintiff, and, if found to be true, would have justified the plaintiff's discharge. It was also testimony which should have been left to the jury, and would have rendered the direction given to them by the court improper. The business which the plaintiff undertook to perform for the defendant was important, and was to be done under the direction of the latter. It required both experience and judgment, and which it was the duty of plaintiff to bring to bear in the performance

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of the service promised; and if he failed in this, and neglected or refused to obey the instructions of the defendant, it was its right and privilege to discharge him.

We think the court in this case also erroneously excluded the testimony tending to show the plaintiff's lack of diligence, his neglect of duty, and want of capacity in the performance of his contract with the defendant while in its service. It went to the merits of plaintiff's case, and should have been admitted. We are inclined to think enough was admitted, however, to make the taking of the case from the jury error.

The defendant's defense is not made to an action for wages, where the plaintiff's ability was known to the employer when the contract for service was made, and which was for such service as the plaintiff had the ability to perform, and was performed accordingly, as in the case of *Champlain v. Stamping Co.*, 68 Mich. 238 (36 N. W. Rep. 57), but here the defendant sought to show and rested its defense upon the facts that the plaintiff did not make the effort, was negligent, and refused to do the very things he had promised in his contract to do; that he had neither the ability nor disposition to do the work he had promised. In other words, he utterly failed to perform his part of the contract, and that what he did do was worthless. The defense offered was confined to a refutation of the facts stated in the declaration, and necessary to be proved in order to enable the plaintiff to recover, and the court should have allowed it to have been shown under the issue made. The other questions presented we need not discuss.

The judgment must be reversed, and a new trial granted.

The other Justices concurred.

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BENJAMIN F. WEBSTER AND ELIZA J. WALLACE, EXECUTOR AND EXECUTRIX OF THE LAST WILL AND TESTAMENT OF HENRY J. WALLACE, DECEASED, v. HIRAM W. SIBLEY AND ISAAC BEARINGER.

Contract—Public policy—Sale of estimates of timber—Commissions—Evidence—Facts equally within knowledge of the deceased—Charge to jury.

1. In a suit by executors upon a verbal contract claimed to have been made with defendants by their testator, the making of which is denied, it is the right of the defendants to put before the jury every fact and circumstance having any tendency to show, or raise the presumption or probability, that such contract never existed.
2. The question of the ownership of estimates of timber, made by a land-looker for a land-owner, and paid for by the latter, is one of law.
3. Until testimony necessarily shows that a fact must have been equally within the knowledge of a deceased person, it ought not to be excluded under the statute making such evidence incompetent in certain cases.
4. When the omission to make demand for a claim against a debtor may be taken as a circumstance against its existence, depends upon the circumstances of each particular case. Among business men in cities, transacting large amounts of business, claims are liquidated every few days, and settlements are made on short time, and the presumption arises much sooner than in the country, where longer credits are usually extended; but in *all* cases the testimony is *competent*, and the question is one for the jury.
5. It is error for the court in his charge to give a construction to important testimony, or undue prominence to testimony of a very doubtful character, prejudical to the rights of either party.

Error to Saginaw. (Gage, J.) Argued October 4, 1888. Decided November 28, 1888.

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Assumpsit. Defendants bring error. Reversed. The facts are stated in the opinion.

Tarsney & Weadock, for appellants, contended:

1. No one employed in the capacity that Wallace was has a right to sell, in the market, the information and estimates thus secured, and defendants have a right to avail themselves of the illegality of the alleged contract; citing *Michoud v. Girod,* 4 How. 553; *Herman v. Martineau,* 1 Wis. 151; *Scribner v. Collar,* 40 Mich. 375.

Wisner & Draper, for plaintiffs, contended:

1. The information or knowledge acquired by Wallace did not become the sole property of Gamble to such an extent that Wallace could not use it to his own advantage, he having done all that he was employed to do to the entire satisfaction of Gamble, who makes no objection; citing *Geiger v. Harris,* 19 Mich. 214; *Paige v. Wells,* 37 Id. 415; but, in any event, no one but Gamble could take advantage of such use; citing *Richardson v. Welch,* 47 Mich. 309.

SHERWOOD, C. J. Henry J. Wallace, in his life-time, was engaged in looking lands and timber in Saginaw county. He had examined and estimated the amount of a quantity of timber standing upon what was known as the "Gamble Tract," and Wallace's executors' claim in this suit is that he, in his life-time, furnished to the defendants, or gave to Mr. Bearinger for them, at their request, a statement of his estimates of the timber upon said tract, with the understanding and agreement with Mr. Bearinger that Wallace was to be paid therefor in case defendants should purchase the property of the owner; and that they did purchase it, and that by reason of the premises said Wallace became entitled to have of defendants a sum equal to 5 per cent. of the money for which said property was sold; and the plaintiffs, in their representative capacity, bring this suit therefor, filing their declaration upon all the common counts, and giving as a bill of the items of plaintiffs' demand the following:

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"To commissions, or a sum of money in the nature of commissions, due the plaintiffs from defendants by reason of the purchase by defendants from Henry Gamble of a tract of pine lands about a year ago for the sum of $105,000. Plaintiffs claim 5 per cent. on said sum of $105,000 as the usual and customary commissions to be paid to persons who furnish buyers of pine lands with the estimate of pine thereon.

"That plaintiff furnished defendants with estimates made by plaintiff of the pine on said lands so bought by the defendants from said Gamble at defendants' request, and under a promise from defendants to plaintiff to pay him a commission in case they, said defendants, bought said lands. The legal title to said lands was in W. R. Burt, and he conveyed to said defendants; but the said Burt only held title thereto as security. The amount of plaintiffs' claim is $5,250."

The defendants pleaded the general issue. On a trial of the cause in the Saginaw circuit, before a jury, the plaintiffs were allowed to recover a judgment for the sum of $2,884. Defendants bring error

On the trial, the contention of the defendants was that no such contract ever existed between Wallace and defendants, express or implied, as is claimed by plaintiffs in their declaration, and, if such a contract was ever made between the deceased and defendants, it was never performed by Wallace. It was further contended by defendants that if Wallace made the examination of the land, and made the estimates of timber thereon, and obtained the information relating to the same, while he was in the employ of Gamble, such estimates were the private property of Gamble, and plaintiffs' testator had no legal right to sell the same to defendants; that if he did so the transaction was void on the ground of public policy.

It was sometime in the fall of 1883 or 1884 that plaintiffs claim the deceased made the bargain with the defendants under which it is sought to hold the defendants. But one person was present when it is claimed the

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agreement was made. The defendants could not testify as to what it was, because of the death of Mr. Wallace. Mr. Leathers claimed to have been present at the time, and testified to what was said. On the part of the plaintiffs he was sworn, and testified to the claimed contract as follows:

"It was in the evening, near dusk. Mr. Wallace told Mr. Bearinger that he had this land for sale; that the price was $110,000, and that it was a good trade, and wanted him to buy it, and told him that he had looked it over, and had a detailed estimate of it, and that he would bring his estimates, and give him his estimates for the land if he would pay him a commission. If he bought the land he was to pay him a commission, and he would give him the detailed estimates. * * * Bearinger told him to bring his estimates, and he would look them over. That is all I recollect of it."

On being further examined he said:

"Mr. Wallace told him that it was a good trade, and how much there was there. I think he told him there was about 28,000,000 feet. * * * Mr. Wallace said he had a refusal of the land for $110,000; that he had the land to sell. Did not say how long the refusal lasted, a refusal to sell the lands for $110,000. He did not say upon what terms the $110,000 was to be paid. * * * The understanding was he was to pay him [Wallace] if he sold the land. * * * There was nothing said about what the commission was to be. * * * I did not hear any time stated when he [Wallace] would bring the detailed estimates to Bearinger. * * * I do not pretend to give the exact language—exact words—of the parties; only the substance of it. * * * The understanding was that he [Bearinger] was to pay him [Wallace] if he sold the land.

"*Q.* But if he didn't sell the land, was he to get any pay?

"*A.* Of course not.

"*Q.* Did Mr. Wallace then say at that time anything to Mr. Bearinger about how long he was to have to buy it in?

"*A.* I didn't hear anything."

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It appears that the estimates cost about $75; that it was worth about that to make them; that they saw Mr. Wallace's estimates, and bought the land sometime in the spring of 1885.

It appears from the record and the case of *Ellsmore v. Gamble*, 62 Mich. 543 (29 N. W. Rep. 97), that said Ellsmore acted as agent of Gamble in making the sale of these lands to defendants, and procured the making of such sale, and obtained his pay therefor; and the defendants claim that in making their purchase of the land they relied upon the estimates furnished for their inspection by Ellsmore; and for a long time before the sale was made defendants had discarded all negotiations and treaties with Wallace upon the subject. On the trial of the cause, when Ellsmore was upon the witness stand, he was asked by defendants' counsel:

"Did you get anything from Sibley and Bearinger in exchange for the estimates furnished?"

The testimony was excluded. We think this was error. In view of the fact that one of the parties to the claimed agreement was dead, and by reason thereof the other was excluded from testifying, and the contract being denied, it was the right and privilege of the defendants to put before the jury every fact and circumstance which would have any tendency to show, or raise the presumption or probability, that such contract never existed. The fact sought to be proved, unexplained, would have had such tendency, and ought to have been admitted.

Mr. Gamble, the owner of the land, testified that Wallace made an estimate of the lands in March, 1883, for him, and he paid Wallace therefor $117; that he never gave Wallace any permission to use the estimates thus made for him (Gamble); that he had them made to get at the value of the land, and the amount of timber there-

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on; that Wallace never had the refusal of said lands but four days, and that was between the 5th and 10th of November, 1883, and that was all that Wallace had to do with the land from the time he delivered to him the estimates he made until he sold the land; and that he (witness) sold the land to the defendants; and that Wallace never had any authority, except under the refusal for the four days, to do anything with the land

When witness Hill was upon the stand, upon his cross-examination by defendants, he was asked:

"Whose property are these minutes,—that of the man who had them made and paid for them, or the land-lookers?"

The witness was not allowed to answer. It is true, the question was asked in connection with others upon the subject of custom. The question, however, only raises a question of law, and was properly excluded.

When Mr. Gamble was on the stand he testified to a conversation he had with Mr. Wallace, in which he said he had nothing to do with selling the land. He was then asked by defendants' counsel:

"What, if anything, did he say with reference to making an affidavit that he (Wallace) had nothing to do with the sale of the land, together with that of Ellsmore, if anything?"

The answer to this question was not allowed, on the objection of irrelevancy and incompetency. The conversation queried after related to a conversation which Wallace had with the witness, relating to Ellsmore's efforts to get his pay of witness for selling the lands to defendants; in which a suit was had. We think the testimony should have been allowed. The testimony tended to negative a portion of the services for which he claimed, and was relevant.

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When Bearinger was upon the stand he was asked by counsel for defendants to—

"State whether or not you ever made any contract, bargain, or agreement with reference to the Gamble lands, in presence of George H. Leathers."

George said he had, when examined for plaintiffs. The court ruled the question was equally within the knowledge of the deceased, and excluded the testimony upon that ground.

This was error. The defendants were not bound by the testimony of Leathers. It was their privilege to contradict him in any way they could upon a material point. The effect of the testimony may or may not have been to establish a fact equally within the deceased's knowledge, but until it does necessarily show the fact to be equally within such knowledge, it ought not to be excluded.

The defendants offered to show that it was not until about two or three years after, as Wallace's representatives claim, he was entitled to the pay they seek from defendants, that he made known that any such claim existed, or that he informed defendants thereof. When the omission to make demand for a claim against a debtor may be taken as a circumstance against its existence, depends upon the circumstances of each particular case. Among business men in cities, transacting large amounts of business, claims are liquidated every few days, and settlements made on short time, and the presumption arises much sooner than in the country, where longer credits are usually extended; but in all cases the testimony is competent, and the question is one for the jury, and we think the testimony offered was proper in this case. The testimony showing the time when Wallace first made the claim against defendants, and the time when he first demanded it of them, was competent evidence in the case.

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It was competent to show by witness Thompson from whom Mr. Bearinger first got his information in regard to these lands, and the amount of timber thereon, and the information Mr. Tarsney gave him upon the subject, and when. The plaintiffs' claim was, in part at least, based thereon; and the defendants had a right to show the important facts in the case were different from what they were claimed to be by the plaintiffs.

We also think the defendants' twenty-first and twenty-second assignments of error, based upon two paragraphs of the judge's charge, should be sustained. They are subject to the criticism made upon them by counsel for the defendants. In the one the court aids the jury to give a construction prejudical to the rights of the defendants to an important piece of testimony. This should not be done. And in the other it gave undue importance to an item of testimony of very doubtful character, to the prejudice of the defendants. We do not think the contract, as claimed by plaintiffs, is against public policy; neither do we think the facts would justify the court in taking the case from the jury, although it is not entirely certain that the facts proved support the contract claimed with the defendants.

For the errors noted we think the judgment should be reversed, and a new trial granted.

The other Justices concurred.

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HENRY W. SAGE v. WILLIAM C. STEVENS, AUDITOR GENERAL, ET AL.

Taxes—Assessment under law of 1882—Lien—Sale—Board of supervisors—Highways—Certificate of clerk as to taxes to be raised—Jurisdiction of supervisor.

1. Taxes for 1882 and 1883, properly assessed under the tax law of 1882, became a lien upon the land, which lien could be enforced under the tax law of 1885 *after* the tax law of 1887 took effect, but the assessment is governed by the law of 1882.
2. The board of supervisors have no power to raise, as a part of the county tax, money to be expended generally upon the highways in a township.
3. A supervisor can only assess such taxes as are properly certified to him by the township clerk for assessment, unless evidenced by other proper official action, and such as the law makes it his duty to assess without such clerk's certificate.[1]

Appeal from Ogemaw. (Tuttle, J.) Argued October 5, 1888. Decided November 28, 1888.

Bill to restrain the sale of land for taxes. Defendants all appeal except the Auditor General. Decree reversed, and one entered against complainant in accordance with the opinion. The facts are stated in the opinion.

Shepard & Lyon, for complainant.

DeVere Hall (*Isaac Marston*, of counsel), for defendants.

SHERWOOD, C. J. The bill in this case is filed to restrain the sale of certain land owned by complainant at the annual tax sale in 1885 for the taxes assessed against it in 1882 and 1883, and to set aside such assessments as illegal and void. Upon the hearing of the cause

[1] See *Iron Co. v. Crystal Falls*, 60 Mich. 511 (head-note 4).

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in the Ogemaw circuit, the circuit judge made a decree restraining such sale, and set aside the assessments. All the defendants appeal to this Court, except the Auditor General. All the proofs are before us upon a case settled by the circuit judge.

The assessments were all made under the law of 1882, and the county treasurer, under the direction of the Auditor General, proceeded to sell the complainant's property under the law of 1885. Just before the sale would have occurred, the complainant filed his bill, and enjoined the collection of the entire taxes for the years 1882 and 1883. The suit is in equity, and complainant relies upon the justice of his case; and while he asks that the entire tax of which he complains may be decreed void, and his lands clouded by the proceedings taken against it may be released therefrom, he avows himself ready and willing to make payment of any part thereof which may be found legal and just.

The fraud charged in the bill upon the supervisor defendants we do not think is sustained.

We have discovered nothing in the assessment of the State taxes against complainant's land rendering the same invalid.

It is true, under the law of 1882, the assessment could be made, but the collection of the taxes could not be enforced by reason of the defective provisions of the act, under our holding, and the provisions of the law of 1885 could not be made to apply for such purpose because its provisions were all prospective. *Humphrey v. Auditor General*, 70 Mich. 292 (38 N. W. Rep. 214).

This infirmity, however, was remedied by Act No. 17, Laws of 1887. The assessment became a lien against the land, if properly made, under the law of 1882, and, if proceedings were taken to enforce collection under the law of 1885, since the law of 1887 took effect, they were

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properly taken, and, if prosecuted in accordance with the statutes of 1885 and 1887, the lien could be lawfully enforced against the land under those statutes. The assessment, however, will be governed by the law of 1882.

At the time appointed for the sale which was enjoined, and at the time this suit was commenced, there was no valid law under which collection could be enforced, and the decree enjoining the same was properly made, and, had it stopped there, further discussion would have been unnecessary, and an affirmance would have been all that is needed to dispose of the case in this Court; but it was also decreed by the circuit judge that the *lien* created by the assessment against complainant's property was also void, and the decree entirely discharges the complainant's land from the assessment. This should not have been done, unless the assessment proceedings were found so far irregular and defective as to render them void. As we have already said, this does not appear as to the State tax, the amount of which complainant can without difficulty ascertain, and should have done so as soon as the assessment roll was completed, to occupy the equitable position he assumes in the case.

As to the county taxes, there is more question. The board of supervisors of the county, in each of the years 1882 and 1883, ordered $1,000 to be raised as part of the county taxes, to be expended upon the highways in the township. The statute of 1882, under which these several amounts were voted by the supervisors in each of said years, provided that the supervisors, at their annual session in October in each year, should determine the—

"Amount of money to be raised for county purposes, and apportion the same * * * among the several townships in the county in proportion to the valuation of the taxable property therein."

It does not appear that this money was voted to be

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raised for any county purpose, or for any purpose for which the county might raise money. It was therefore unauthorized, and the complainant should be relieved from the payment of any portion thereof.

Section 23 of the tax law of 1882 requires the township clerk of each township to make and deliver to the supervisor of his township a certified copy of all statements and certificates on file, and of all records of any vote or resolution in his office, on or before the 1st day of October in each year, authorizing or directing moneys to be raised therein by taxation for township, school, or highway purposes, together with the aggregate amount thereof; and the supervisor is directed to deliver the same to the clerk of the board of supervisors of the county on or before the second Monday of the same month; and the county clerk is required to lay the same before the board at its annual meeting.

Certificates were made by the clerk of each of the defendant townships, in which it is stated that such copy is true and correct of all statements on file or of record in the office of the clerk, of moneys proposed to be raised in the township for all purposes, including school, township, and highway taxes. The supervisor can only assess such taxes as are properly certified to him by the clerk for such assessment, unless evidenced by other proper official action, and such other as the law makes it his duty to assess without such certificate by the clerk.

We find none of the highway taxes for either of the years 1882 and 1883 properly certified to the supervisors of the several townships, or by the clerk of the county to the board of supervisors for their action, and no proper action taken by such board warranting the extension of such taxes upon the assessment roll of either of such townships against the lands of complainant; and he is

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entitled to relief against these to the amount of such assessments.

The decree rendered in the case at the circuit should be set aside, and decree must be entered against the complainant in conformity with the views herein expressed for the amount of the taxes assessed, less the illegal portions mentioned, and execution will be allowed to issue against the complainant therefor, without costs, and, until paid, the amount will be allowed to remain a lien upon the property.

The other Justices concurred.

MELVIN NEWTON v. WILLIAM GORDON.

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Vicious dog—Injury—Pleading—Declaration.

In an action under How. Stat. § 2119, to recover damages for injuries sustained from an assault by a vicious dog, the plaintiff need not aver the knowledge of the owner or keeper that the dog was accustomed to do such damage or mischief.

Error to Wayne. (Brevoort, J.) Argued October 10, 1888. Decided November 28, 1888.

Case. Defendant brings error. Affirmed. The facts are stated in the opinion.

Fred T. Sibley (*Edwin F. Conely*, of counsel), for appellant.

James H. Pound and *Jay Fuller*, for plaintiff.

SHERWOOD, C. J. This action was brought in the Wayne circuit court for injury done to the plaintiff and his family, and to his horse and wagon, upon the high-

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way, along which he was at the time traveling in a wagon, by the defendant's dogs.

The declaration contains two counts, each stating substantially the same grievance. The first is brought under How. Stat. § 2119, which reads as follows:

"If any dog shall have killed, or assisted in killing, wounding, or worrying, any sheep, lamb, swine, cattle, or other domestic animal, or that shall assault or bite or otherwise injure any person while traveling the highway, or out of the inclosure of the owner or keeper of such dog, such owner or keeper shall be liable to the owner of such property, or person injured, in double the amount of damages sustained, to be recovered in an action of trespass or on the case; and it shall not be necessary, in order to sustain an action, to prove that the owner or keeper knew that such dog was accustomed to do such damage or mischief; and upon the trial of any cause mentioned in this section the plaintiff and defendant may be examined under oath, touching the matter at issue, and evidence may be given as in other cases, and if it shall appear to the satisfaction of the court, by the evidence, that the defendant is justly liable for the damages complained of under the provisions of this act, the court shall render judgment against such defendant for double the amount of damages proved, and costs of suit, but in no case shall the plaintiff recover more than five dollars costs."

The second count charges a right of action at the common law. The recovery at the circuit was for the plaintiff for $130 under the first count, and for the defendant upon the second count, which subsequently was doubled on motion of the plaintiff's attorney, and judgment entered accordingly under the statute. As the plaintiff has not appealed, only the grievances of the defendant need be considered, and under the case as presented these are confined to the proceedings had under the first count.

It is first insisted by appellant that there is nothing in the statute which dispenses with the averment that such dog doing the mischief was accustomed to do the same,

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and upon the ruling of the circuit judge to the contrary defendant's counsel base 13 assignments of error. The court was right in the ruling. The statute expressly says, in a case like the present, the plaintiff need not show that the defendant had previous knowledge of the vicious habits of his dog. The only reason for the averment at common law was that it was necessary to show knowledge of such fact in the defendant before plaintiff could recover. The reason of the rule requiring the averment to be made having been entirely abrogated by statute, the rule itself must be allowed to go with it; otherwise a senseless form would be perpetuated, and which, as often as taken advantage of, would prove destructive of substantial rights.

There is no question but that the defendant owned or controlled a number of dogs, and harbored more, at the time of the injury complained of, and that they were together at or near the place where the plaintiff's horse was attacked; and the jury by their verdict found that the injury was done in the highway by one or more of them. Whether it was done by the largest or smallest, or by one or more of them, is unimportant. If any one did the damage or caused the injury to plaintiff, and the animal belonged to the defendant, the judgment is right, and should not be disturbed.[1]

The court submitted the case to the jury upon the question of damages as favorably as the defendant could expect. It really went to the jury upon the actual damages to the plaintiff's horse, if they found the injury was done by the defendant's dog or dogs in the highway.

Defendant had no ground for complaint upon the court's charge, and, without considering the case further, we think the judgment should be affirmed.

The other Justices concurred.

[1] The declaration charged the defendant with owning and keeping a large number of dogs, and that said *dogs* bit the leg of the horse, etc., while the proof showed that only one dog did the biting.

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FREDERICK T. STAHL v. WILLIAM A. DEHN.

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Mortgages—Defeasible purchase—Redemption—Sale—Contract for repurchase.

1. Defeasible purchases are narrowly watched, and courts of equity always favor the right of redemption.
2. From the mere fact of an agreement to reconvey, either with or without an advance in price, an absolute conveyance will not be turned into a mortgage.
3. Contracts for repurchase, made contemporaneously with conveyances of real estate, absolute in form, are sometimes strong evidence tending to show that the conveyances are intended to be mortgages; but where it appears that the parties really intended an absolute sale, and a contract allowing the vendor to repurchase, such intention must control, and to ascertain the intention of the parties the court will look beyond the writings to the circumstances surrounding the transaction.

Appeal from Wayne. (Brevoort, J.) Argued October 10, 1888. Decided November 28, 1888.

Bill to remove cloud from title. Defendant appeals. Decree affirmed. The facts are stated in the opinion.

Elliott G. Stevenson and *Charles S. McDonald*, for complainant, contended:

1. A conveyance with the right of repurchase is not necessarily a mortgage; citing *Conway's Ex'rs v. Alexander*, 7 Cranch, 237; *Glover v. Payn*, 19 Wend. 518; *Slowey v. McMurray*, 27 Mo. 113; *Hill v. Grant*, 46 N. Y. 496; and to ascertain the intention of the parties the court properly looked beyond the deeds and writings at the circumstances of the contract; citing *Brant v. Robertson*, 16 Mo. 129; *O'Neill v. Capelle*, 62 Id. 202.
2. Nothing short of clear, precise, explicit, unequivocal, and absolute proof should convert an absolute deed into a mortgage; citing *Plumer v. Guthrie*, 76 Penn. St. 441; *Todd v. Campbell*, 82 Id. 250; *Burger v. Dankel*, 100 Id. 113; *Logue's Appeal*, 104 Id. 136; *Hartley's Appeal*, 103 Id. 23; *Huoncker v. Merkey*, 102 Id. 462; *Rowand v. Finney*, 96 Id. 196.

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James H. Pound, for defendant, contended:

1. Under defendant's theory, this paper is but a mortgage; citing *Swetland v. Swetland*, 3 Mich. 482; *Batty v. Snook*, 5 Id. 231; *Enos v. Sutherland*, 11 Id. 538.
2. In cases of doubt, the presumption is always in favor of a permission to redeem; citing *Rice v. Rice*, 4 Pick. 349; *Russell v. Southard*, 12 How. 139.
3. Whatever form a contract or instrument may have, if the attending circumstances show it to have been intended as security for a debt or a loan of money, or anything but a clear-cut bargain and sale, a court of equity will always decree redemption; citing 4 Kent, Com. 142; *Taylor v. Luther*, 2 Sumn. 228; and an attempt to convert such a conveyance into an absolute one is a fraud upon the law; citing *Rogan v. Walker*, 1 Wis. 527; *Woodward v. Pickett*, 8 Gray, 617.
4. If several instruments are made and delivered the same day between the same parties, in relation to the same subject-matter, they are regarded as parts of one instrument, and will be construed together; citing 2 Washb. Real Prop. 46, § 8; *Bayley v. Bailey*, 5 Gray, 505; *Murphy v. Calley*, 1 Allen, 107.
5. An absolute deed, with a bond or separate defeasance or agreement to reconvey the estate upon the payment of a certain sum of money, constitute a mortgage, if the instruments are of the same date, or are executed and delivered at the same time and as one transaction, in which case it is a conclusion of law that they constitute a legal mortgage; citing *Jeffery v. Hursh*, 58 Mich. 257.

LONG, J. The bill was filed in this cause in the Wayne circuit court, in chancery, to remove a cloud from the title of complainant's lots, lying on the Boulevard in the city of Detroit.

It appears that sometime in March, 1885, the defendant called upon complainant, who he had been advised had a horse and buggy for sale, valued at $300, and desired to purchase, if the complainant would take in exchange his two Boulevard lots, which he placed at $600, and would pay the mortgage thereon, then amounting, with interest, to the sum of $307.

After some talk, the parties went to the law-office of C. B. Howell, in Detroit, where the arrangement was

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completed, and Mr. Howell was directed to draw the papers. Defendant executed and delivered to complainant a warranty deed of the premises, in consideration of which complainant turned out to defendant his horse and buggy, and was to pay the mortgage on the lots. Before the parties separated, another paper was drawn by Mr. Howell, and executed by complainant, and delivered to defendant. The exact time when this paper was drawn is in dispute between the parties. Whether it was at the exact time with the execution and delivery of the deed, or was an after arrangement, the parties are not agreed. It is conceded, however, to have been made before the parties separated on that day. After this paper was executed by complainant, Mr. Howell made a copy. Dehn signed it, and delivered the same to complainant. The copy reads as follows:

"Whereas, the undersigned has this day purchased of Dr. Wm. A. Dehn, of Detroit, lots twenty-four (24) and twenty-five (25) in Maybury's subdivision of lot 18, of Mandlebaum's sub. of fractional sections 1 and 36, being corner of Boulevard and Seventh streets, I hereby agree to reconvey to said Dehn said lots within six months from this date, for the sum of six hundred and twenty-five dollars and such expense as said Stahl is put to in paying taxes, etc., in the mean while upon said lots, and interest at seven per cent. on said purchase price.

"F. T. STAHL.

"*Detroit, March* 23, 1885.

"Witness: C. B. HOWELL.

"I certify that the above is a true copy of an agreement dated this ——— day of ———. W. A. DEHN."

It is the claim of the complainant by his bill that this paper so executed and delivered by him to defendant was simply an option on the part of defendant to repurchase the property within the time limited, and at the price specified, and, defendant having failed to exercise it within the time, complainant has a right to have the premises

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discharged from the cloud created upon the title by defendant placing the same upon record; that his deed conveyed to him an absolute title. It is contended by complainant that at the time he executed the paper he did not acknowledge its execution before any officer, and that the paper, a copy of which was given him, drawn in Mr. Howell's handwriting, and certified by defendant, did not contain at that time any certificate of acknowledgment, nor was there but one witness to its execution.

The original of this paper was offered in evidence by defendant, and it appears that it contains a certificate of acknowledgment by C. B. Howell, notary public, and is witnessed by Mr. Howell and Mr. L. G. Wilcox. The certificate of acknowledgment bears date the same day as the paper, and is a blank form cut from a blank, and pasted upon the paper executed by complainant, but the certificate is filled out and signed by Mr. Howell. This paper was not recorded until August 4, 1885.

Defendant contends that the two papers were executed at the same time, and as one and the same transaction; and the giving of the deed and the agreement to reconvey was intended by the parties as a mere security for the price of the horse and buggy, and that the two papers constitute a mortgage. This is the only question in the case.

On the hearing in the court below the complainant prevailed, and had a decree as prayed in his bill, removing the cloud from his title. Defendant appeals.

The testimony was taken in open court. Considerable testimony was taken by the parties as to what took place and what was said by the parties before and at the time of the execution of these papers, and some contradictions arise. The parties are not agreed upon many of the claimed facts. It very satisfactorily appears, however, that these lots were valued in the exchange by the defend-

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ant at about their fair market price, and that very soon after complainant obtained his deed he paid off and had discharged this $307 mortgage upon the premises. By the terms of the agreement, the complainant was to pay taxes, and was to reconvey only on condition that the defendant paid the amount of moneys expended in addition to the principal amount, and an additional $18 and interest. The consideration paid was equal to the whole value of the property. There was no legal obligation on the part of the defendant to repay the consideration money, and in fact no offer was made to repay.

Judging from the papers themselves, this was simply a sale of the land for a consideration paid at the time, with an agreement to resell at a future day at an advanced price; the resale depending upon the election of the defendant. There were no previous dealings between the parties, and no debt was created by the transaction. Defeasible purchases are narrowly watched, and courts of equity always lean strongly in favor of the right of redemption; still it is well settled that from the mere fact of an agreement to reconvey, either with or without an advance in price, an absolute conveyance will not be turned into a mortgage. *Glover v. Payn*, 19 Wend. 518.

In *Robinson v. Cropsey*, 2 Edw. Ch. 138, there had been previous dealings between the parties, but the debt was extinguished at the time of the conveyance, and the vice-chancellor held that an absolute deed, with a separate agreement for the right to redeem within a year, was not a mortgage, but a sale on condition. Contracts for repurchase, made contemporaneously with conveyances of real estate, absolute in form, are sometimes strong evidence tending to show that the conveyances are intended to be mortgages; but where it appears that the parties really intended an absolute sale, and a contract allowing the vendor to repurchase, such intention must control.

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Hanford v. Blessing, 80 Ill. 188; *Smith v. Crosby*, 47 Wis. 160 (2 N. W. Rep. 104).

To ascertain the intention of the parties whether the deed was absolute in fact as in form, or merely a conveyance to secure an indebtedness, the court will look beyond the writings to the circumstances surrounding the transaction; and, judging from such surrounding circumstances, it appears clear that the parties at the time regarded it as an absolute sale, with simply an option on the part of the defendant to repurchase at an advanced price. No talk was had about the purchase of the horse on time, and giving security for its payment, but the whole arrangement, as appears by the record, was that defendant was to purchase the horse and give in exchange therefor the lots in question, subject to the mortgage, which complainant was to pay, and did pay, and that the defendant might at his option repurchase the lots at an advanced price, if he exercised that option within six months from the date of the sale. It appears that the defendant was advised some time after the six months had elapsed that he still had a right to redeem, and the whole transaction could be treated as a mortgage, instead of an absolute deed. We are clearly of the opinion, however, that the parties did not so understand it at the time, and all the circumstances surrounding the transaction favor most strongly the complainant's claim that it was an absolute sale, and not intended as a mortgage.

The decree of the court below must be affirmed, with costs.

The other Justices concurred.

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JEROME EDDY v. THE MERCHANTS,' MANUFACTURERS' & CITIZENS' MUTUAL FIRE INSURANCE COMPANY OF KENT, ALLEGAN, AND OTTAWA COUNTIES.

Mutual fire insurance companies—Territorial limits for transaction of business—Constitutional law.

Policies of insurance issued by a mutual fire insurance company incorporated under Act No. 82, Laws of 1873, *outside* of the territorial limits fixed by said act, are issued without authority, the law of 1883 supposed to authorize such action having been declared unconstitutional in *Skinner v. Wilhelm*, 63 Mich. 568.

Error to Genesee. (Newton, J.) Argued October 11, 1888. Decided November 28, 1888.

Assumpsit on insurance policy. Defendant brings error. Reversed without a new trial. The facts are stated in the opinion.

William E. Grove (*W. H. Haggerty*, of counsel), for appellant, contended as stated in the opinion.

Arthur J. Eddy, for plaintiff, contended:

1. As a general proposition, a corporation, whether simply *de facto* or properly organized, cannot retain the benefits of a contract, though it is *ultra vires*, and repudiate the obligations; citing *Bradley v. Ballard*, 55 Ill. 413, 417; *Swartout v. Railroad Co.*, 24 Mich. 389, 392; *Empire Mfg. Co. v. Stuart*, 46 Id. 482; *Trustees v. Froislie*, 37 Minn. 447; Bigelow, Estoppel, 530; *Bank v. Matthews*, 98 U. S. 629; *Railway Co. v. McCarthy*, 96 Id. 267.

SHERWOOD, C. J. This action is upon a policy of insurance issued by the defendant company, March 23, 1885, to one Samuel J. Lewis, for one year, upon the property mentioned in the policy. Plaintiff is assignee

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of the policy. The company received as cash premiums when the policy was taken out $100, which it still retains.

On July 23, 1885, the insured property was destroyed by fire. Immediately after the fire, Lewis forwarded to the company a statement of all insurance upon the property, and of the loss to the company; and, it being informed, the company forwarded to him blanks upon which to make the statement more in detail of the insurance and loss, and the president of the company came on to adjust the loss. The statement and proofs of loss were completely made August 3, 1885.

It would appear from the testimony that the defendant did not at any time disclaim its liability, or claim any defense to the plaintiff's claim, before the assignment to him, and not until after the commencement of this suit, but, on the contrary, it promised to pay the same. After the proofs of loss were made, the board of directors ordered an assessment for the purpose of paying it, and both the secretary and treasurer of the company wrote the plaintiff, promising payment.

The foregoing facts were not very much disputed, and it is claimed by plaintiff that they constitute a waiver of any defense arising from breach of warranty or double insurance, which are claimed on the part of defendant; and besides these the defendant claims that the company had no power to issue the policy, and has no power to assess policy-holders for its payment, and that the settlement and adjustment of the amount of plaintiff's claim to be paid, contained in the statement of loss, was entirely unauthorized; that by the rules of the company only the directors could adjust and settle a claim of the amount of that made under plaintiff's policy.

On the trial at the circuit the plaintiff obtained a ver-

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dict for $2,364.76. The defendant complains, and asks a review.

I have no doubt but that there was sufficient evidence tending to show, in the action taken by the company, a waiver of all its defenses, excepting that of power and authority to make the contract of insurance with Lewis, and that upon the other points the case was properly submitted to the jury, whose verdict is against the defendant.

The defendant became incorporated August 31, 1881, under the law of 1873, and the amendments thereof. See How. Stat. p. 1085. The following prohibition is contained in section 3 of the act (section 4249), viz.:

"No company organized under this act shall do any business, or take any risks, or make any insurance, in more than three counties in this State, which counties shall be contiguous, and shall be named and set forth in their charter," etc.

After the statute of 1883 went into effect, defendant disposed of all its policies, except manufacturing risks; and, after amending its articles of association to conform to its change of business thus made, commenced doing business outside of the three counties named, and it was while it was doing business outside that it took the policy in Genesee county under which the plaintiff claims. We held, in *Skinner v. Wilhelm*, 63 Mich. 568 (30 N. W. Rep. 311), the law of 1883 unconstitutional. This, of course, left the business done outside of the three counties within the prohibition of the general statute above referred to, and left the company without any authority whatever to make the one sued upon in this case. There is plausibility in what is said by the learned circuit judge upon this point; but the law, as well as the justice of the case between these parties, lies just beyond, and requires us to hold that a contract made without authority, either

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by an individual or by a corporation, must be held void.

The judgment must be reversed, and a new trial will not be allowed.

The other Justices concurred.

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City Planing & Shingle Mill Company v. The Merchants', Manufacturers' & Citizens' Mutual Fire Insurance Company.

Fire insurance—Construction of clause voiding policy in case mill should "cease to be operated."

1. The shutting down of a shingle-mill for 42 days for want of logs which were *in transit*, and detained by reason of low water, but which were daily expected to arrive, and which began to be delivered the day the mill was burned, will not avoid a policy of insurance providing for such a result in case "the mill shall cease to be operated" without notice to or the consent of the insurance company.
2. In such a case it is proper for the plaintiff to show that a planing-mill owned by the insured, and distant from the shingle-mill about 125 feet, and connected with it by cable power which operated both mills, was kept in operation, and that other mills were shut down the same season on account of low water, thus showing that such stoppages were incident to and to be expected in that locality.

Error to Mason. (Judkins, J.) Argued October 11, 1888. Decided November 28, 1888.

Assumpsit on an insurance policy. Defendant brings error. Affirmed. The facts are stated in the opinion.

William E. Grove (*W. H. Haggerty*, of counsel), for appellant, contended:

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1. Plaintiff had ceased to operate the mill for 42 days continuously next preceding the fire, without notice to defendant, and the policy was thereby rendered void; citing *Day v. Ins. Co.*, 70 Iowa, 710; *Keith v. Ins. Co.*, 10 Allen, 230; *Mack v. Ins. Co.*, 106 N. Y. 560; *Wooden Ware Works v. Ins. Co.*, 37 Minn. 300; *Reid v. Ins. Co.*, 90 N. Y. 382.

2. Neither the want of logs necessary to the operation of the mill, nor the fact that a supply was daily expected, and that plaintiff intended to resume operations when they came, will justify or excuse the breach; citing *Ins. Co. v. Cherry*, 84 Va. 72; *Day v. Ins. Co.*, 70 Iowa, 710.

Wing & Samuels, for plaintiff, contended:

1. Whether under all the facts and circumstances the stoppage of the mill was a breach of the condition in the policy, was a question for the jury; citing Wood, Ins. § 436; *Ins. Co. v. Norton*, 96 U. S. 234.

2. Delays and interruptions incident to the business of conducting a saw-mill, although involving a temporary discontinuance of its active use, will not make the mill "vacant and unoccupied," within the meaning of the policy; citing *Whitney v. Ins. Co.*, 72 N. Y. 120; *Ins. Co. v. Leathers*, 8 Atl. Rep. 424; *Ins. Co. v. Mfg. Co.*, 125 Ill. 131; *Harrington v. Ins. Co.*, 124 Mass. 126; *Stupetski v. Ins. Co.*, 43 Mich. 373; *Ins. Co. v. Tucker*, 92 Ill. 64; *Herrman v. Ins. Co.*, 81 N. Y. 184; *Shackelton v. Fire Office*, 55 Mich. 288; *Poss v. Assurance Co.*, 7 Lea, 704.

MORSE, J. The only question of real importance in this case is whether the mill of plaintiff, at the time it burned, had "ceased to be operated" within the meaning of the policy of insurance sued upon.

The shingle-mill of plaintiff was situated on the bayou of the Pere Marquette lake, at Ludington, about 125 feet east of a planing-mill owned and operated by plaintiff, from which it received its motive power, by a cable connecting both mills. The stock of logs for the use of the shingle-mill was obtained from the pineries some 50 miles from Ludington, and were run down the Pere Marquette river. These logs were delivered by the Pere Marquette Boom Company, which had charge of the running, driv-

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ing, sorting, booming, and delivery of logs on this river and its tributaries.

The mill was insured in the defendant company, February 4, 1886, for $2,000, by an agent who was on the ground and filled out the application and made a survey of the premises. Among other things the policy contained the following clause:

"If the insured shall make any false representations of the condition, situation, or occupancy of the property hereby insured, or shall conceal any fact material to the risk, or in case of overvaluation, or any misrepresentation whatever, by the insured, either in a written application or otherwise, or if the insured shall have, or shall hereafter effect, any other insurance on the property hereby insured, or on any part thereof, without the permission of this company indorsed hereon, or if the risk shall be increased either by the occupancy of the premises in such a manner as to increase the hazard, or by the erection or occupancy of adjacent buildings, or if the premises shall become vacant or unoccupied, or, if a mill or manufactory, it shall cease to be operated (unless shut down for repairs), without a notice to and consent of this company indorsed hereon in each and every case, this policy shall become void:

"PROVIDED, however, that mills or manufactories capable of being operated during certain seasons only shall not be deemed vacant when shut down for the customary period."

The mill was burned September 10, 1886, and totally destroyed. At the time of the fire it was not running, and had not been running since July 29, 1886. On the last-named day the plaintiff shows (and it was not disputed in the evidence) that the stock of logs in its boom was exhausted, and the operations of the mill temporarily suspended. A new supply of logs was expected soon, and from day to day up to the time of the burning. The plaintiff had logs in the Pere Marquette river in course of transportation by the boom company, and a boom of logs for its use reached the mill on the day of

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the fire. The planing-mill was kept in operation all the time, and the shingle-mill crew were waiting, expecting to go to work when logs arrived.

It was also shown that the summer of 1886 was a very dry one, and the water being low was the reason of the logs being delayed. The mill was not shut down for good, or for repairs, but temporarily closed waiting for logs. No notice of the stoppage was sent to the insurance company, as the plaintiff claims, because work was intended to be resumed as soon as the logs came, and they were expected daily. It was further shown, against the objection and exception of defendant, that it was a usual and frequent occurrence that other mills in the same locality were shut down or unable to operate this same season and other seasons on account of the low water.

The defendant claimed on the trial that it was not liable, because the mill had ceased to be operated without notice to it, in violation of the clause in the policy heretofore quoted. The court submitted this question to the jury, who found specially that the mill had not ceased to be operated within the meaning of the policy. The plaintiff recovered.

The court did not err in so submitting the question. Indeed, from the undisputed evidence, as a matter of law, it must be held that the clause was not violated. The stoppage of the mill was occasioned solely by the want of logs to manufacture. The logs were expected daily, and their not being received was not the fault of plaintiff. It was a mere temporary suspension, which, in the first place, was supposed would only last a few days, and after that from day to day. This clause cannot mean that a stoppage of this kind for a day, or even a week, for want of running material, an event quite likely to occur once

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or more in any season, would be considered "ceasing to operate." The policy speaks of premises becoming vacant or unoccupied "or, if a mill or manufactory, it shall cease to be operated." This must mean something more than a temporary suspension. It must mean a closing with the intention of ceasing operation, not a shutting down for a few days or weeks because of the happening of events incident to the conducting of a mill in that locality, and which might be reasonably expected, such as the want of logs because of low water, which caused the suspension in this case. See *Whitney v. Ins. Co.*, 72 N. Y. 120; *Ins. Co. v. Leathers*, 8 Atl. Rep. 424; *Ins. Co. v. Mfg. Co.*, 125 Ill. 131 (17 N. E. Rep. 776). See, also, *Stupetski v. Ins. Co.*, 43 Mich. 373 (5 N. W. Rep. 401); *Shackelton v. Fire Office*, 55 Id. 288 (21 N. W. Rep. 343); *Poss v. Assurance Co.*, 7 Lea, 704.

It was proper to show the location of the planing-mill and its connection with the mill burned, and that it was in operation, as a part of the surroundings of the fire, and as bearing on the main question. So the fact of mills shutting down temporarily for the same reason as this mill was admissible, showing that such stoppages were incident to and to be expected in that locality.

After the mill was burned there was considerable correspondence between the companies, as well as interviews between the members of the plaintiff corporation and the president and secretary of the defendant. The president of the company visited Ludington to ascertain about the loss in the latter part of September, 1886. On that occasion the plaintiff's evidence shows that he was informed of the exact time, 42 days, that the mill was idle. He admits he was told the mill was idle, but did not suppose it was over 10 days. The defendant company, in answer to an inquiry, was informed by letter dated Janu-

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ary 3, 1887, of the number of days the mill had been shut down. After that the secretary at Grand Rapids called the attention of Mr. Filer, one of the members of the plaintiff company, to the clause in the policy, but said the insurance company did not intend to stand on technicalities. The first intimation given plaintiff that defendant intended to resist payment of the loss was in a letter, written March 9, 1887, six months after the fire.

The question whether the defendant, under these circumstances, had not waived the defense here insisted upon, was also submitted to the jury, who found a waiver. We think there was no error in this. We have not set out in this opinion the full facts upon which the waiver was claimed, because we think the plaintiff, under the law, as applied to the undisputed facts, was entitled to a verdict, waiver or no waiver. But the facts claimed, if believed by the jury, were in law sufficient to support their finding that the defense was waived.

We find no error in the case. The judgment is affirmed, with costs.

The other Justices concurred.

ARTHUR HILL v. HARVEY GRAHAM, TREASURER OF THE TOWNSHIP OF BRUCE.

Taxes—Assessment of copartnership personalty—Error in name of firm—Logs in transit—Replevin—Charge to jury.

1. The provision of section 5, Act No. 153, Laws of 1885, that the firm name shall be used in assessing property owned or occupied by a copartnership whenever the name of the owner or occupant is required to be entered upon the assessment roll, is

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directory, and must be construed in connection with section 89 of the same act, which declares that no tax shall be held invalid on account of having been assessed in the name of any other person than the owner.

2. The decision in this case, and in *Lumber Co. v. Collins*, 66 Mich. 64, and in *Dairy Co. v. McKinlay*, 70 Id. 574, in so far as the question of the assessment of personal property in a firm name is involved, is based upon the facts appearing in the record, that the assessment was made and the collection sought to be enforced against the rightful owners, and that the roll contained sufficient notice to them that their property was assessed, the underlying principle being that a person whose property is liable to assessment for taxes shall not be permitted to evade payment of his just proportion of the public burden by any errors, omissions, or irregularity that do not prejudice his rights.

3. A request which asks the court to charge the jury what the evidence shows is rightly refused.

4. The charge of the court on the question of when logs are in transit is held as favorable to the plaintiff, at least, as he had a right to expect.

5. Replevin will not lie for saw-logs seized to satisfy taxes assessed thereon in a township where the logs were liable to assessment, which assessment appears by the roll to be in all respects regular and valid. *Hood v. Judkins*, 61 Mich. 576 (head-note 5).

Error to Chippewa. (Steere, J.) Argued October 12, 1888. Decided November 28, 1888.

Replevin. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

G. K. Grout (*D. P. Foote*, of counsel), for appellant.

John H. Goff (*George A. Cady*, of counsel), for defendant.

CHAMPLIN, J. This is an action of replevin brought by James H. Hill, Wilbur H. Hill, and Arthur Hill, then composing the firm of James H. Hill & Sons. James and Wilbur having died since the commencement of suit, and their deaths having been properly suggested

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of record, the case proceeded, and now stands as above entitled.

On June 2, 1885, James H. Hill, Wilbur H. Hill, and Arthur Hill, composing the firm of James H. Hill & Sons, resided at Saginaw; and had their business office at East Saginaw, and were engaged in general lumbering business. On that day they entered into a contract with James Redy to cut and put afloat in the Munoskong river, and to run and deliver at its mouth, all the pine timber on lands belonging to said firm, or either member thereof, in township 45 N., ranges 1 E. and 1 W., 44 N., range 1 W., and certain specified lands in township 44 N., range 1 E., the whole work to be completed on or before July 1, 1887.

In the winter of 1885–86, Redy had cut and banked about 10,000,000 feet of saw-logs. The Munoskong river is a stream down which logs are run to the St. Mary's river. Its course passes through the townships of Bruce and of Pickford. When these logs were cut, the owners designed them to be run to the mouth of the St. Mary's river, and from thence be transported in rafts to Saginaw, to be there manufactured into lumber. But, by the course of events subsequently to the bringing of this suit, the design to manufacture them at Saginaw was not fully carried out, and many of them were sawed into lumber at Detour, in said county of Chippewa.

On the second Monday of April, 1886, the supervisor of Bruce township went to the place in his township where the logs were banked, and found the creek bed, which was a small stream, piled full of logs, and also piled back from the creek on dry land a distance of 100 yards. These logs were in piles on the dry ground, and he estimated that there were 11,000,000 feet of them. The creek was frozen up, and the logs were not being run, although preparations were being made to run them

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when the creek, or "river," as it is called, should be in condition for running logs. The supervisor assessed the logs as personal property, and entered the same upon his assessment roll as follows: Under the heading upon his roll of—

"Name of Owner or Occupant," "James H. and Arthur Hill & Co. Logs in sections 30 and 32 and 33 and 22, T. 45, 1 E., and sections 23 and 14, T. 45, 1 W.,—amounting to (6,000,000) six million, at ($5) per thousand. Said logs marked 'N I C E;'"—

And under the heading "Personal Estate Assessed," he entered the assessment at $30,000. This assessment went before the board of review, and the assessment was entered, in the column headed "Value as fixed by Board of Review," at the sum of $30,000.

About July 24 of that year, the supervisor who made the assessment resigned, and another person was appointed to act in his place. This supervisor took it upon himself, without authority, to alter the assessment upon the roll, by striking out the 6,000,000, and inserting 4,000,000, as the quantity of logs assessed, and by striking out $30,000, and inserting $20,000, as the amount assessed in the column as fixed by the board of review. In this condition the assessment roll went before the board of supervisors, and subsequently the taxes were extended upon the roll by the supervisor, and it was placed in the hands of the township treasurer for collection.

The counsel for plaintiff made four written requests to charge, all of which were refused as presented, said requests reading as follows:

"1. If the jury find that the plaintiffs did not compose the firm of J. H. & Arthur Hill & Company, on the second Monday of April, 1886, then their verdict should be for the plaintiffs.

"2. If the jury find that the logs of the plaintiffs had been placed on skidways on the banks of the river, and in the river, and were so situated on the second Monday of April, 1886, and had been thus placed with the intention of running and driving them

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to their destination, outside of the township of Bruce, as soon as the stage of water in the river would permit, then all the logs would be in transit, and not liable to assessment in the township of Bruce for the year 1886, and their verdict would be for the plaintiffs.

"3. The evidence in this case shows that the plaintiffs, James H. Hill, Wilbur H. Hill, and Arthur Hill, are the general owners of the logs in question, and entitled to their possession, if the claim made by the defendant is not valid. The defendant, shortly before the writ in this cause was issued, as treasurer of the township of Bruce, in this county, seized and took into his possession these logs, under and by virtue of the tax roll of the township of Bruce for the year 1886, and the warrant annexed thereto, to satisfy a personal property tax assessed against 'James H. & Arthur Hill & Co.,' and defendant claims a right to the possession of the property under and by virtue of said tax roll, and the right to satisfy said tax by a sale of such property. The statute under which the tax in question was assessed, and is sought to be enforced, provides that, 'for the purpose of assessing property and collecting taxes, a copartnership shall be treated as an individual, and, whenever the name of the owner or occupant of property is required to be entered upon the assessment roll, if such property is owned or occupied by a copartnership, the firm name shall be used.' We must look to the official tax roll to discover against whom property is assessed, and cannot be aided by parol testimony. The assessment in this case was against James H. & Arthur Hill & Co., and the evidence in the case shows that the plaintiffs do not, and on the second Monday of April, 1886, did not, compose, and in fact never composed, the firm of James H. & Arthur Hill & Co., and never did business under that firm name, and that neither of them ever belonged to such a firm. It therefore follows, as a matter of law, that the tax was not assessed against these plaintiffs, and their property could not lawfully be taken to satisfy it, and your verdict should be for the plaintiffs.

"4. The evidence in this case shows that on the second Monday of April, 1886, one of the plaintiffs resided in the city of East Saginaw, and the other two in the city of Saginaw, in this State, and that they did not, nor did either of them, on that day reside in the township of Bruce, and that they did not have control of, nor hire, nor occupy, a store, mill, office, mine, farm, storage, manufactory, or warehouse in said township 'for use in connection with these logs,' and that the logs in question, and other logs, were cut by James Redy from lands belonging to plaintiffs in this county, during the winter of 1885 and 1886, and were in the usual way of doing such business, and as fast as they were cut, taken to a banking ground in said township, on the banks of the Munoskong river,

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a navigable stream, or left upon the bank thereof, to be put into the stream as soon as the condition of the water would permit, to be run to the mouth of said stream, and from there to be towed to a point upon the Saginaw river, as the place of their destination, to be manufactured into lumber; that on the second Monday of April, 1886, a considerable portion of the logs so taken by plaintiffs from their lands were already run and floated down said stream, beyond the limits of said township, and plaintiffs were engaged in putting the remainder thereof into the stream to be run, towed, and transported to said Saginaw river. Such appearing to be the facts, and it also appearing from the evidence in the case that there was no sorting ground of any rafting and driving agent or booming company on said river in said township of Bruce, and that said township was not nearest to the mouth of said river, it follows, as a matter of law, that these logs could not legally be assessed to the plaintiffs in the township of Bruce, and they be required to pay a personal property tax thereon; and your verdict must be for the plaintiffs."

1. There was no evidence in the case tending to prove the existence of a firm by the name of James H. & Arthur Hill & Co., or that either of the plaintiffs was a member of such firm. The plaintiffs showed that the plaintiffs, James H. Hill, Wilbur H. Hill, and Arthur Hill, composed the firm of James H. Hill & Sons, and that these individuals, as such firm, owned the logs assessed. The first and third requests are based upon the fact that the logs were not assessed in the proper firm name, and attention is called to the statute which provides that,—

"For the purposes of assessing property and collecting taxes, a copartnership shall be treated as an individual, and whenever the name of the owner or occupant of property is required to be entered upon the assessment roll, if such property is owned or occupied by a copartnership, the firm name shall be used."

This section is directory merely, and must be construed in connection with section 89 of the same act, which declares that—

"No tax assessed upon any property shall be held

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invalid on account of having been assessed in the name of any other person than the owner."

The point has been twice ruled against the plaintiffs' position by this Court. The first case was that of *Petrie Lumber Co. v. Collins,* 66 Mich. 64 (32 N. W. Rep. 923). In that case a tax was assessed and levied against "A. H. Petrie & Co." upon the roll, when in fact the property assessed, which was both real and personal estate, belonged to the Petrie Lumber Company, a corporation. This Court held, under a statute of 1882, which is the same in terms with that of 1885, above quoted, that such assessment was valid, and authorized the township treasurer to collect it by levy and sale of the property of the Petrie Lumber Company.

The other case was that of *Michigan Dairy Co. v. McKinlay,* 70 Mich. 574 (38 N. W. Rep. 469). In that case the tax was assessed and levied against "D. P. Clay or the Michigan Dairy Co." The Michigan Dairy Company in fact owned the property, and the township treasurer levied upon and sold the property of the Michigan Dairy Company to collect the tax assessed as personal property. The company brought trover against the collector. We held that the assessment came directly within the terms of the curative statute above quoted, and was also ruled by the case of *Lumber Co. v. Collins.*

In this case the property assessed belonged to the plaintiffs, and their property was seized to enforce payment of the tax. We do not see that the rights of the plaintiffs, whose property was taxed, were prejudiced by the mistake of inserting the wrong name as owner. The names of two of the owners appear in the assessment, and it cannot be claimed that the owners were misled, or made to believe that their property was not upon the assessment roll, or that there was not a sufficient notice of an assessment against their property contained in the roll to

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call upon them to appear before the supervisor or board of review to object to any assessment against their property appearing upon the assessment roll. It must be held, therefore, that the assessment roll contained, so far as appeared from the face of the roll, a valid assessment and tax against the property of the plaintiffs, which it was to all appearances their duty to pay.

This case, as well as the two above referred to, where this point was involved, may be considered as being based upon the facts appearing in the record, that the assessment was made and the collection sought to be enforced against the rightful owner, and that the roll contained sufficient notice to him that his property was assessed. The underlying principle is that a person whose property is liable to assessment for taxes shall not be permitted to evade payment of his just proportion of the public burden by any errors, omissions, or irregularities that do not prejudice his rights. *Tyler v. Hardwick,* 6 Metc. 470; *Westhampton v. Searle,* 127 Mass. 502; *Sargent v. Bean,* 7 Gray, 125; *State v. Vanderbilt,* 33 N. J. Law, 38; *Farnsworth v. Rand,* 65 Me. 19; *Shoup v. Railroad Co.,* 24 Kan. 547.

2. The remaining request relates to the question of whether the logs were taxable in the township of Bruce. The request was rightly refused, for the reason that it asked the judge to charge the jury what the evidence showed. Had he done so, he would have been invading the province of the jury. Upon the subject of the request, he charged the jury as follows:

"The logs in question are what is classed in our tax laws as 'forest products,' and we have a recent statute in this State which provides that property of that class, owned by residents or non-residents, shall be assessed to the owner, or to the person having control thereof, in the township or ward where the same may be, except that where such property is in transit to some place

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within the State it is to be assessed at such place. All forest products in transit on the second Monday in April, and thereafter found in the waters or streams of this State, shall be held to have a place of destination at the sorting grounds nearest the mouth of such stream, unless the contrary is made to appear.

"The law also provides that logs, lumber, pickets, telegraph poles, ties, and other forest products, if piled or left in any yard, railroad reserve, shed, or any other place, shall not be deemed in transit, but are to be assessed to the owner in the township where they are found. Therefore it becomes an important question in this case whether or not logs were in transit. If they were, they were not liable to taxation in Bruce township, and the plaintiffs are entitled to your verdict. If they were not in transit, they would, under the undisputed evidence, be liable to taxation there.

"When we speak of goods in transit, we mean on the way or passage, while going from one place or person to another, in the course of business or commercial dealing.

"So if you find that on the second Monday of April, 1886, the plaintiffs were driving the logs of which the logs in this suit formed a part, towards their destination, or were breaking the rollways and jams for that purpose, or were working upon them in the ordinary way, with a view of driving them towards their destination, or as many of them as the stage of water in the river would permit, then the logs would be in transit, and not liable to assessment in the township of Bruce for that year; and your verdict will be for the plaintiffs.

"But if you find from the evidence that the logs in question were not in the waters or streams in question; were not actually started on their way or passage down it, but in unbroken piles, awaiting the breaking up of the river or rise of water, or some future event, before starting,—the mere intent of the owners, unaccompanied by any acts showing their present purpose to drive the logs, would not justify you in regarding the property in transit.

"What was the condition of these logs on the second Monday of April, 1886, and what, if anything, was being done with them at that time, are disputed questions of fact, for you to decide from the evidence. If you find that the logs were in transit, your verdict will be for the

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plaintiffs, that they are entitled, and were at the time of the commencement of this suit, to their property. If you find that defendant did not unlawfully detain the property replevied, then, by virtue of his seizure, he had a lien to the amount of the tax against the logs, to wit, $680, and, having waived a return of the property, would in such case be entitled to a verdict for the amount of his lien."

This charge fully covered the ground, and was as favorable to the plaintiffs, at least, as they had a right to expect; and, the jury having passed upon the facts, holding, as their verdict shows, that the logs were not in transit, the case is presented then of a seizure of property to satisfy a tax which appears upon the roll to be regularly assessed in a township where it was subject to be assessed, and in all respects presumably regular and valid. The statute is plain, and forbids replevin—

"For any property taken by virtue of any warrant for the collection of any tax, assessment, or fine in pursuance of any statute of this State,"—

And before the writ can be executed an affidavit must be annexed thereto, stating that the property described in the writ—

"Has not been taken for any tax, assessment, or fine levied by virtue of any law of this State."[1]

We think this case comes within the prohibition of this statute. We should not, therefore, consider the questions raised, based upon an unauthorized alteration of the roll by the assessor after he had received it from the board of review. The court committed no error in permitting a recovery for the amount of the tax lien. *Hill v. Wright*, 49 Mich. 229 (13 N. W. Rep. 528).

As was said in the case cited:

[1] How. Stat. §§ 8318, 8321.

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"If the plaintiff has been legally wronged, he must seek redress in some other way than by replevin."

The judgment is affirmed.

The other Justices concurred.

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JOHN O'CALLAGHAN v. WILHELM BOEING.

Commissions on sale of real estate—Evidence—Charge to jury—Argument of counsel.

1. Where there is testimony tending to support the theory upon which a party has tried his case, it is error to refuse to instruct the jury upon such theory, unless the instruction asked for is covered by the general charge.
2. Where counsel bases an argument to the jury upon a state of facts unsupported by the testimony, it is error to refuse to instruct the jury that no such facts have been proved, when requested by the opposing counsel at the close of such argument.
3. Where a defendant, sued for commissions claimed by plaintiff as due him on a sale of land, defends on the theory that he has paid the agreed commissions to another real-estate agent, by direction of the plaintiff, and that the two were to make a division of the same, and the second agent testifies that he received the money under such an arrangement, which he has not carried out, he may be asked on cross-examination why he has not paid plaintiff his share of the money.

Error to Wayne. (Gartner, J.) Submitted on briefs October 12, 1888. Decided November 28, 1888.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

J. T. Keena, for appellant.

Dickinson, Thurber & Stevenson, for plaintiff.

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[The positions of counsel are fully stated in the opinion.—REPORTER.]

LONG, J. This cause was tried in the circuit court for Wayne county, before a jury. Plaintiff had judgment for $2,617.50. Defendant brings the case to this Court by writ of error.

The undisputed facts appearing upon the trial were that defendant, residing at the city of Detroit, a pine-land dealer, owning a quantity of pine land in Minnesota, in May, 1885, placed the same in the hands of Ziba B. Graham, engaged in buying and selling such lands on commission, for sale at the price of $35,000. The understanding was that, if Graham made the sale at this price, he should receive a commission of 5 per cent.

Plaintiff resided at Norway, Mich., and is engaged in the same business as Graham. Graham and plaintiff opened correspondence with each other, with a view of disposing of these Minnesota lands. Plaintiff, representing that he had a purchaser for the lands, entered into an agreement with Graham to divide the commission. After considerable correspondence between plaintiff and Graham, principally designed to have Graham arrange with defendant so that the most money could be made for mutual profit, plaintiff came to Detroit, bringing his purchaser with him, and was there introduced to defendant by Graham. At this time a new agreement was entered into, by which defendant was to deed the lands for the consideration price of $33,000, and when said amount was received from the purchaser $3,000 thereof was to be paid by defendant as commissions; the actual consideration to defendant being $30,000. The sale was made, money collected, and the defendant paid the $3,000 commissions over to Graham, who retained the whole of it, not paying any part of it over to plaintiff, for some

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reason, which Graham was not permitted to disclose on the trial.

The disputed fact is, to whom was the commission to be paid by defendant, under the agreement?—plaintiff claiming that defendant agreed to send him $2,250 of the amount, and pay $750 to Graham; defendant claiming that he agreed to pay the commission to Graham, who had the lands in his hands for sale, and the division thereof was a matter between plaintiff and Graham, in which he had no concern. It also appears that, after the price and manner of dealing was agreed upon, O'Callaghan and Graham disputed between themselves about the division of the $3,000, and finally agreed on the basis of $2,250 for O'Callaghan and $750 for Graham.

Mr. Graham testified upon the trial that the $3,000 was to be paid by defendant to him; that it was so paid a short time after it was received by the defendant but he had paid no part of it over to plaintiff. Witness was then asked by defendant's counsel:

"After the $3,000 was paid to you, how did it come about that you did not pay Mr. O'Callaghan?"

This was objected to as immaterial, and excluded by the court. The witness Graham further testified:

"I had not seen Mr. Donovan [the purchaser] before he came to Detroit. O'Callaghan represented the buyer, and I the seller. I claimed one-half the commissions. That was the understanding O'Callaghan and I had. On the day we consummated the sale, I induced Boeing to take less than $35,000. I did not own the land. I was trying to get a good price for it, and I brought O'Callaghan and Boeing together. I was authorized by Mr. Boeing to sell the land at $35,000, and I expected to get my pay out of the 5 per cent. on the $35,000. I did not expect to get anything out of the purchaser; I wanted O'Callaghan to do that. I knew this $3,000 was paid by the purchaser. I did not expect that Mr. Boeing in this trade would pay the 5 per cent. Our agreement was that I should get my commissions out of the $3,000."

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The defendant also testified that—

"Mr. Graham or any one else was not to receive a commission out of the $30,000. I did not agree to pay any commission on that price."

On making the closing address to the jury, counsel for plaintiff argued:

"That the payment of the $3,000 commission by Boeing to Graham was an attempt on their part to relieve Boeing of the payment to Graham of the commission of 5 per cent. on the selling price of the land, and that the attempt now to claim that the understanding between Boeing and Graham was that he (Graham) was not to have a commission on this sale, making it an exception to the general arrangement existing with reference to the payment by Boeing to Graham of a commission of 5 per cent. on any lands he should sell for Boeing, was negatived by the agreement that O'Callaghan was to have $2,250 of this $3,000 commission, and Graham only $750. He evidently, in assenting to this arrangement as to the division of the $3,000, relied upon his 5 per cent. commission from Boeing on the $30,000; and $1,500, with the $750 he was to get out of the $3,000 coming from the purchaser, would make his share $2,250, and O'Callaghan's $2,250."

Counsel further argued that—

"Graham received the $3,000 from Boeing as Boeing's agent, to send $2,250 of it to O'Callaghan, and Graham under such circumstances kept the $2,250 that Boeing had intrusted him with as his agent. Graham committed a criminal act in keeping it, and is liable to prosecution therefor."

At the close of the testimony the defendant's counsel requested the court to charge the jury as follows:

"1. That if the jury find that the agreement was that Boeing could pay the $3,000 commission to Graham, to be divided between O'Callaghan and Graham, the verdict should be for defendant.

"2. If the jury find that Mr. Boeing agreed to pay the $3,000 to Mr. Graham, their verdict must be for the defendant.

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"3. That if the jury find that the agreement was that Boeing should pay the commission to Graham, under the facts in this case O'Callaghan has a right of action against Graham, and not against Boeing.

"4. The plaintiff is not entitled to recover unless the jury find Boeing expressly agreed to pay the $3,000, or $2,250 to O'Callaghan.

"5. The burden of proof in this case is upon the plaintiff to show such contract.

"6. That under the agreement, as testified to by Mr. Boeing, he was bound to pay the $3,000 to Mr. Graham.

"7. There is no evidence in this case that Mr. Boeing paid this $3,000 to Mr. Graham as his (Boeing's) agent, to send $2,250 to O'Callaghan.

"8. The undisputed evidence is that the only commission to be paid by Boeing to either Graham or O'Callaghan was the $3,000."

These requests the court refused to give in his charge to the jury, and upon such refusal error is assigned. We think the first five requests to charge were all substantially covered by the general charge, and need not be discussed.

We think the court was in error in refusing the sixth request to charge. The request was, in substance, that if the jury found as claimed by the defendant, that it was agreed that he should pay this commission of $3,000 over to Graham, then he had fully performed the agreement upon his part in making such payment to Graham. This was the theory of the defendant from the outset of the trial, and the only defense sought to be made to the action. It was denied by the plaintiff, he claiming the arrangement to be that the defendant was to send the $2,250, when received from Donovan, directly to him. If, however, the arrangement was as testified to by the defendant, then he was justified in paying it to Graham, and the plaintiff, having authorized such disposition of the money, could not maintain the action against defendant after such payment was made.

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The most serious error, however, was in the refusal of the court to give the seventh and eighth requests to charge. These requests were presented at the conclusion of the argument of counsel for plaintiff, and, in view of the remarks made and the position taken by plaintiff's counsel, the court should have given these requests. There was no warrant for the assumption by counsel that Graham was to have an additional 5 per cent. commission from Boeing. Both defendant and Graham had positively denied this upon the trial, and no evidence was given to contradict them, and Graham had fully explained why he had consented to take the $750, and allow O'Callaghan the $2,250 of the commission. It was upon the representation of O'Callaghan himself that he had two others to divide commissions with, and, as Graham testified, he supposed it was allowing to each of the four $750, and apparently, rather than have the trade fall through, he assented to the arrangement, and agreed that O'Callaghan should have the $2,250 for the purpose of closing it. Graham's testimony became very important in the case. Plaintiff's claim and theory was that when the commissions were collected from the purchaser the defendant was to pay him his agreed part directly, and, not having paid it, he had a right of recovery. The defendant, on the other hand, claimed that the agreement and understanding was that when the money came to him from Donovan he was to pay the whole $3,000 over to Graham, and that in pursuance of such agreement he had so paid it. If this claim made by defendant was substantiated, then the plaintiff had no right to recover, and the court substantially so instructed the jury. Plaintiff and defendant are directly opposed to each other in their testimony upon this proposition.

Mr. Graham is called as a witness, and gives his ver-

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sion of the agreement, and supports fully the testimony of the defendant. It became a question of fact for the jury, as to which side of the controversy was right. Plaintiff's counsel, to destroy the effect of the testimony of Mr. Graham, in his argument to the jury makes the claim, or advances a new theory in the case, not supported, but entirely contradicted, by the evidence in the case, that Graham—

"Evidently, in assenting to this arrangement as to the division of the $3,000, relied upon his 5 per cent. commission from Boeing."

But counsel does not stop there. He asserts that in the defendant paying the $3,000 over to Graham he made him his agent to send O'Callaghan the $2,250, and that Graham, in keeping it, committed a criminal act, and is liable to a prosecution. There is no testimony in the case to warrant this assumption. The plaintiff's claim was that the money was to be sent to him. The defendant's claim was that he was authorized by the plaintiff to pay the whole to Graham, and in this he is supported by Graham. What the reason was for Mr. Graham's withholding the money from plaintiff does not appear. The defendant sought to make it appear, but the counsel for plaintiff made objection, and the court excluded it. We think it was important, under the defendant's theory, to show why the money had not reached the plaintiff, after having been paid to Graham. If, as defendant claims, he was directed by the plaintiff to pay to Graham, then Graham became plaintiff's agent to receive and transmit the money to him; and, Graham having received it, the defendant had discharged his full duty to plaintiff, and could not be compelled to pay again.

The agent of plaintiff, under this theory of the case, was being examined, and, having admitted the payment to him of the money, was asked why he did not pay it

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over. The principal says that "it is immaterial. I have a right of recovery against the defendant upon another theory." The answer to this inquiry may or may not have shown some arrangement between plaintiff and Graham in reference to this money, by which Graham was to apply his share in another way for his benefit; and if any arrangement had been shown between the plaintiff and Graham making a disposition of the money for plaintiff's benefit, he would be considered as adopting or consenting to the payment to Graham. This testimony was competent, and the court was in error in excluding it, as well as in refusing to charge the jury as requested by defendant in his seventh and eighth requests to charge.

For the errors pointed out the judgment of the court below must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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INDEX.

Head-note references are to pages. Where there are several notes on a page, the number of the note is added in parenthesis, unless the reference is to all.

Cross-references are to *subjects*, and the same rule is followed as to giving *number* of head-note.

ACCOUNT—See EVIDENCE (1, 2).

ACCOUNTING—See EXECUTORS AND ADMINISTRATORS (1); TRUSTEES.

ACTION—See CONTRACT (1).

ACTS OF CONGRESS—See CONGRESSIONAL DEBATES.

ADMISSION—See CIRCUIT COURT RULE 79.

ADVERSE POSSESSION.

1. Adverse possession, for the statutory period, of 40 acres of land, under a recorded deed covering the entire 160 acres, will not, of *itself*, give the occupant title to the land not so *actually* occupied. 409 (1).
2. In *Murray v. Hudson*, 65 Mich. 670, it was held that evidence of the adverse use, for the statutory period, of a parcel of land as a wood lot appurtenant to a farm, in the usual and ordinary way pertaining to the ownership of farm lands, was a good defense as against one claiming under the original title. *Id.* (2).

AGENT—See BOARD OF SUPERVISORS; PRINCIPAL AND AGENT.

AGREEMENT TO RECONVEY.

From the mere fact of an agreement to reconvey, either with or without an advance in price, an absolute conveyance will not be turned into a mortgage. 645 (2).

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APPEAL.

It is the effect, and not the form, of the order or decree, or its particular classification, which determines the right to appeal. 460 (21).

ARCHITECT.

In this case it is held that architects who furnished a design for a public art gallery, to be passed upon by a board of experts, and which was not accepted, could not recover for their services in preparing it. 82.

ARGUMENT TO JURY.

Where counsel bases an argument to the jury upon a state of facts unsupported by the testimony, it is error to refuse to instruct the jury that no such facts have been proved, when requested by the opposing counsel at the close of such argument. 669 (2).

See CHARGE TO JURY (6).

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. How. Stat. § 8744, was intended to give to the creditors of an insolvent debtor ample relief against the incompetency, neglect, or fraud of the assignee. 235 (1).
2. A creditor may file a bill, under How. Stat. § 8744, to set aside a chattel mortgage, alleged to have been given in anticipation of an assignment by the mortgagor, and to secure to the mortgagee a preference, to which transaction the assignee is alleged to have been a party, without obtaining an order from the court requiring the assignee to institute proceedings to annul said mortgage. *Id.* (2).

BAILMENT.

In this case it is held that the defendant held the moneys sued for as bailee of plaintiff's assignor, and is liable to the plaintiff for the same. 191.

BENEFIT ASSOCIATIONS.

1. In this case it is held that while, technically speaking, the decedent may not have died seized of the insurance held by him in the defendant association, his intention was to pass it by his will to plaintiff, as also all of his other property, and the judgment is affirmed. 7.
2. Under the constitutions and regulations of the Knights of

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BENEFIT ASSOCIATIONS.—Continued.

Honor, when the supreme lodge signs a benefit certificate, and forwards it to the subordinate lodge, the contract is complete, and it is the duty of the subordinate lodge to deliver it, and it holds it for the member until delivered to him. 816 (1).

3. In such a case, if the local lodge assumes the right to retain the certificate because of alleged fraudulent practices and representations of the member at time of becoming such, the beneficiary in a suit to recover the insurance may be excused from producing the certificate on the trial. *Id.* (2).

4. Where, in such a case, there is sufficient testimony to enable the jury to determine what the contract of insurance was, if the certificate contains any special provisions or limitations which do not appear from the constitutions and regulations and other evidence in the case, it is the defendant's duty to produce it. *Id.* (3).

5. Insurance, if it may be so called, in benefit associations, is usually for the benefit of the widow or other person dependent upon the member in his life-time, and where the constitution makes it the duty of the subordinate lodge to report the death of a member to designated officers of the supreme lodge, and to make a report to the state medical examiner of the circumstances of his last illness and death, and to notify the beneficiary that it is unnecessary to employ or pay any person for obtaining payment of the benefit, the intention is manifest that the officers of the local lodge undertake to make and certify the proofs of death, and to do everything required to place the beneficiary in the possession of the benefit secured by the certificate. 817 (4).

6. When, in a suit to recover such benefit, the defendant sets up the death of the member, and refuses to pay on the ground of fraud practiced in becoming such, it will be presumed that proofs of death were made by the subordinate lodge. *Id.* (5).

7. Where, in such a case, the declaration avers that there was duly prepared a paper, in the usual form, assuring to the member and to the plaintiff the benefit sued for on the death of the member, which averment is not denied by the defendant under circuit court rule 79, the execution of the certificate will be deemed to be admitted for the purposes of the trial, which admission will support a verdict in favor of the

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BENEFIT ASSOCIATIONS.—Continued.

plaintiff, although the certificate is not introduced in evidence. *Id.* (6).

8. How. Stat. § 4225, was not intended to nor does it apply to co-operative and mutual benefit associations. 603 (1).

9. Mutual benefit and co-operative associations, whether corporations or mere voluntary associations, are, strictly speaking, insurance organizations, whenever, in consideration of periodical contributions, they engage to pay the member or his designated beneficiary a benefit upon the happening of a specified contingency. *Id.* (2).

10. In this case it is held that the "Fraternal Alliance," an Illinois corporation organized to establish a secret order, which shall cultivate social and fraternal relations among its members, and furnish aid to those of them that may become sick or disabled, but no annual dues or premiums to be required, and all aid and assistance to be by voluntary subscription, comes within the exception of section 25 of Act No. 187, Laws of 1887, and has a right to do business in this State without being in any manner under the control of the Commissioner of Insurance. 604 (4).

BIGAMY—See CRIMINAL LAW (4, 5).

BILLS AND NOTES.

1. It was competent for plaintiff to show why the notes for the alleged balance due him from defendant were, for purposes of discount, made nominally by plaintiff to defendant's order. As between each other it is competent to show who was principal and who was surety. 167 (2).

2. The rule requiring an indorser to be promptly notified of the dishonor of a note is not one of form, but of substance. It is a legal condition of the contract that he shall be notified or discharged, unless where reasonable diligence fails to find him, and this rule requires that the person giving the notice shall use such means as are reasonably calculated to find out the indorser's residence. 393 (1).

3. There is no legal presumption that the receiving teller at a bank knows anything about the parties on discounted paper, although he may do so. *Id.* (2).

4. It is the plain and obvious duty of a notary to apply to the officers of his own bank for information as to the residence of an indorser, and if they cannot give it to inquire where

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BILLS AND NOTES.—Continued.

it is payable, as well as, in default of both, to seek further, which search, while not required to be unreasonably long where he has no clue, should be real, and not formal. *Id.* (3).

5. A second indorser, by putting his name above that of the payee, who has indorsed the note for the accommodation of the maker, chooses to make himself a joint maker, and disqualifies himself from recourse to the first indorser as liable to him in the order of time. *Id.* (4).

6. It was held in *Greusel v. Hubbard*, 51 Mich. 95, that parties must sue and be sued on negotiable paper in the order in which they have seen fit to sign it. *Id.* (5).

See EVIDENCE (4, 5, 11); PLEADING (3).

BILL TO REDEEM.

In this case an assignment of a land contract is held a mere mortgage, and redemption is decreed against the assignee, who had procured a deed and taken possession, on the payment of the amount secured by said assignment, and taxes, less the rental value of the premises during his unlawful occupancy. 194 (1, 3).

BOARD OF SUPERVISORS.

The board of supervisors of a county have *exclusive* authority over the subject of the erection of houses for the reception of the poor of their county, and in its exercise may employ such agents as they choose to execute what they have determined to do. 295 (1).

BOOKS OF ACCOUNT.

A township treasurer's books are competent evidence of his indebtedness to the township in a suit upon his bond. 1 (1).

See EVIDENCE (1, 2).

BOND.

Where on a settlement with a township treasurer the amount due the township, and for which he fails to account, is undisputed, and no well-grounded apprehension exists as to the legal liability of the bondsmen for the debt, the township board has no legal authority to release the principal or his sureties from his or their legal obligation to pay the amount to the township. 1 (3).

See PUBLIC BUILDINGS.

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BRIDGES—See HIGHWAYS.

BURDEN OF PROOF.

1. In a contest between the owner of adjoining land and a municipal corporation claiming the existence of a public street or highway over such land, the burden of proof is upon the municipality. 249 (1).
2. The burden of proof is upon the complainant to show his mental incompetency when he seeks to set aside his contracts on that ground. 420 (1).
3. When a party deals with a man whom he knows to be of weak intellect, and the good faith of such dealings is challenged, he has the burden of proof to show that no undue advantage was taken. *Id.* (2).

See EVIDENCE (16)

CASH SALE—See EVIDENCE (16).

CERTIORARI.

1. On *certiorari* from a conviction before a justice of the peace the respondent can claim no error not shown by the return. 175 (2).
2. Under the settled practice in this State, a justice's return of what he *knows officially* must determine the result on *certiorari*. *Id.* (3).

CHALLENGE—See CRIMINAL LAW (9, 10).

CHARACTER—See CRIMINAL LAW (21).

CHARGE TO JURY.

1. Where the *bona fide* holder of a chattel mortgage replevied the property from a third party, who claimed to have sold it to the mortgagor, conditionally, retaining the title until paid for, his rights under such sale should not be submitted to the jury apart from the circumstances tending to show, as claimed by the plaintiff, that by his conduct he had waived or abandoned his rights in the property. 71.
2. It is error to so instruct a jury, in a case involving alleged fraud, as to give them to understand that the evidence must be so clear and conclusive as to leave no rational doubt in their minds as to its existence. 301.
3. It is error for the court in his charge to give a construction to important testimony, or undue prominence to testimony of

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CHARGE TO JURY.—Continued.

a very doubtful character, prejudicial to the rights of either party. 630 (5).

4. A request which asks the court to charge the jury what the evidence shows is rightly refused. 660 (3).

5. Where there is testimony tending to support the theory upon which a party has tried his case, it is error to refuse to instruct the jury upon such theory, unless the instruction asked for is covered by the general charge. 669 (1).

6. Where counsel bases an argument to the jury upon a state of facts unsupported by the testimony, it is error to refuse to instruct the jury that no such facts have been proved, when requested by the opposing counsel at the close of such argument. *Id.* (2).

See REQUESTS TO CHARGE (1).

CHANCERY APPEAL.

It is the effect, and not the form of the order or decree, or its particular classification, which determines the right to appeal. 460 (21).

CHATTEL MORTGAGE.

In a replevin suit involving the rights of a mortgagee, and a vendor of the property who claims to have retained the title as security for the payment of the purchase price, the question of the rights of such vendor should not be submitted to the jury separate from testimony tending to show a waiver on his part. 71.

CIRCUIT COURT RULE NO. 79.

Failure to deny under oath, under circuit court rule 79, an averment in a declaration of the issuance of a certificate of insurance sued upon, amounts to such an admission as will support a verdict although the certificate is not introduced in evidence. 317 (6).

COMMENCEMENT OF SUIT—See STATUTE OF LIMITATIONS (2).

COMMISSIONER OF INSURANCE—See BENEFIT ASSOCIATIONS (10.)

COMMISSIONS—See EVIDENCE (7).

COMPLAINT—See CRIMINAL LAW (1).

CO-OPERATIVE ASSOCIATIONS—See BENEFIT ASSOCIATIONS (8, 9).

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CONDEMNATION PROCEEDINGS.

1. The *power* to appoint commissioners in railroad condemnation proceedings is conferred by How. Stat. § 8332 (as amended by Act No. 7, Laws of 1887); but the right to *exercise* it depends upon the existence of certain facts, which must be made to appear by petition to the court empowered to make the appointment. 206 (1).

2. An averment in such a petition that it is necessary for public use to take, for the use of the petitioner's road, the property and rights described in the petition, to the extent and for the purposes therein stated, is sufficient. *Id.* (2).

3. Whether the property in question in this case was necessary to accommodate the spur tracks mentioned, and whether the taking was necessary to develop business along the line of petitioner's road, were questions to be determined by the board of directors, and the petition sufficiently alleges that this has been done, and gives the conclusions of said directors. 207 (3).

4. Whether or not the necessity and public use required the taking of the property were questions for the commissioners to determine, and they determined that they did after viewing the premises and hearing the testimony, and in such case their determination of these questions will be held final. *Id.* (4).

5. It was unnecessary for it to appear that more was done in the construction of the road than is stated in the petition, before appointing commissioners; and if more is stated than the statute requires, it will be no reason for refusing the appointment, if the statutory requisites appear, and are substantiated before the court making the appointment. The petition in this case states that the map of the road sought to be constructed, showing the property asked to be condemned, was made and filed in the proper county. *Id.* (5).

6. Upon the map filed by the petitioner, its road at East Saginaw appears, with its terminal branches for which condemnation is now sought. They were a part of the proposed road, designated and surveyed with the main line at the same time, and there is no reason why for the purposes of the map they should not be considered a part thereof. As such, they received the certified approval of the board of directors, which should be held sufficient to give the State board of

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CONDEMNATION PROCEEDINGS.—Continued.

railroad crossings jurisdiction to act, and to make the proper order in the premises. *Id.* (6).

7. It was not necessary that it should be found essential to the development of business along the line of the road that spur tracks or branches should be constructed by any other board or tribunal than a majority of the directors, before the State crossing board might act, and this determination is stated in the petition. *Id.* (7).
8. The discontinuance of the proceedings as to the King-street track could not affect the action to be taken as to the other branches. *Id.* (8).
9. The purpose for which the rights are sought to be condemned in this case is held to be a public use. *Id.* (9).
10. Before a railroad company can construct its road it must make a survey of the route and line it desires for that purpose, and a map thereof, and file the same in the office of the register of deeds as required by statute, and it may then secure the right of way over the surveyed line by private purchase of the owners, and, if unable to do so, may institute condemnation proceedings for that purpose. *Id.* (10).
11. The map and survey adopted by the board of directors is intended to and must designate the line of road by which the place of termination is to be reached, and the line or lines upon which it is proposed to enter such place, and the ground to be occupied for its terminal facilities for the transaction of its business; and the property and franchises of another railroad company, or of any company, like the property of an individual, when condemnation is sought, is subject to the same proceedings, except that the franchises of the former cannot be seriously impaired, or to the extent of depriving it of the same. 208 (11).
12. The line or lines which the board of directors may adopt for the road on entering a city or village at the terminal points, when made a part of the original survey and designated upon the map, become a part of the main line of the road; and when the map and survey have received the approval of the State crossing board the rights of any other road may be condemned for its crossings, to the extent above stated. *Id.* (12).
13. The case of the construction of a branch or spur, or an extension not included in or with the main line, as a part

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CONDEMNATION PROCEEDINGS.—Continued.

thereof, after the map and survey have been adopted and approved by the State crossing board, or after the railroad has been completed, is not presented on this record. *Id.* (13).

CONDITIONAL SALE.

In a contest between a mortgagee, and a vendor who claims to have sold the property to the mortgagor conditionally, retaining the title until paid for, his rights under such sale should not be submitted to the jury apart from the circumstances tending to show, as claimed by the mortgagee, a waiver of such rights. 71.

CONSTITUTIONAL LAW.

1. Act No. 17, Laws of 1887 (sec. 2), which attempts to validate sales made under the tax law of 1885 for the taxes of previous years, is unconstitutional. 202 (2).
2. The proposition that the Legislature can make good that which was void when done, is utterly at variance with the fundamental principles of law. *Id.* (3).
3. Act No. 94, Laws of 1883, making it the duty of officers who contract for the erection of public buildings to require security from the contractor for the payment of claims for labor and materials, is held constitutional by a majority of the Court. 295 (3).
4. It was held in *Attorney General v. Rice*, 64 Mich. 385, that parties could not stipulate or agree, or admit by pleading, that a statute was not properly or constitutionally passed by the Legislature, nor could parol proof be used for that purpose. 446 (1).
5. If the *object* of an act of the Legislature is fully expressed in its title as *passed*, the form or *status* of the title during any of the preceding stages of legislation is immaterial. *Id.* (3)
6. A substitute cannot be considered a new bill (Art. 4, § 28, Const). *Id.* (4).
7. The legislative practice of reading a bill twice by its title, and only once at length, has been maintained too long in this State to be now overthrown by the courts. *Id.* (5).
8. Act No. 233, Laws of 1885, as amended by Act No. 189, Laws of 1887, limiting the recovery in suits brought for libel in certain cases to actual damages, as defined in said act,

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CONSTITUTIONAL LAW.—Continued.

is not within the power of constitutional legislation. 560 (1).

9. Act No. 175, Laws of 1883, was declared unconstitutional in *Skinner v. Wilhelm*, 63 Mich. 568. 651.

CONSTRUCTION OF ACTS OF CONGRESS—See CONGRESSIONAL DEBATES.

CONGRESSIONAL DEBATES.

Congressional debates cannot be much, if at all, regarded on matters of verbal construction of acts of Congress. The language used must be given effect, if it has a consistent meaning and it is matter of familiar knowledge that members voting for a bill do not always act on the same understanding. 43 (4).

CONTENTS OF PAPER—See EVIDENCE (3).

CONTINUANCE—See CRIMINAL LAW (12).

CONTRACT.

1. Defendant issued a circular inviting designs for the first section of a public art gallery which it proposed to erect, giving a full description of the grounds and proposed building, and character of the designs it desired submitted, which were to be passed upon by a competent board of experts, and the author of the one accepted was to be employed to complete a set of plans, with details, at the usual rate of compensation, of the American Architect's Association, and specified prizes were to be awarded for the two designs deemed next highest in merit, but the board was not to be obliged to make any award if none of the designs were deemed worthy. Plaintiffs submitted a design, which was not deemed meritorious by the board, and was not accepted by defendant, and brought suit for their services in preparing it, and the Court hold that upon the undisputed facts they cannot recover. 32.
2. The law throws its protecting shield around mentally incompetent persons, from whatever cause, and while, in some cases, it is permitted them to make contracts so long as they are not under the restraint of guardianship, these are binding only so far as they rest upon adequate considerations, and are free from fraud or overreaching. 420 (3).
3. Distinctions have been recognized between cases of insanity and mere weakness of intellect or imbecility. Contracts made

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CONTRACT.—Continued.

with insane persons have pretty generally been held void, and those made with the latter class, voidable merely. *Id.* (4).

4. Contracts which are voidable because of the weakness of intellect of a party can be enforced or repudiated in a court of equity upon equitable grounds. If they have been executed by one party, and are executory upon the part of the imbecile, they can only be set aside at his instance by his doing equity. *Id.* (5).

CONTRACT FOR REPURCHASE.

Contracts for repurchase, made contemporaneously with conveyances of real estate, absolute in form, are sometimes strong evidence tending to show that the conveyances are intended to be mortgages; but where it appears that the parties really intended an absolute sale, and a contract allowing the vendor to repurchase, such intention must control, and to ascertain the intention of the parties the court will look beyond the writings to the circumstances surrounding the transaction. 645 (3).

CONTRADICTORY STATEMENTS—See EVIDENCE (11).

COSTS.

In a suit in the circuit court to recover damages for the sale of liquor to a minor, if the claim in the declaration is sufficient in amount to give the court jurisdiction, costs follow the judgment regardless of its amount. *Theisen v. Johns*, 293, 294.

COVENANT—See DRAINS (4).

CREDITORS' BILL—See JUDGMENT CREDITOR'S BILL.

CRIMINAL LAW.

COMPLAINT.

1. A complaint for an offense not triable by a justice may be oral, although the better practice is to reduce it to writing. 116 (2).

PRELIMINARY EXAMINATION.

2. Until the examining magistrate has determined that an offense, not cognizable by a justice of the peace, has been committed, and that there is probable cause to believe the

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CRIMINAL LAW—Continued.

respondent guilty thereof, and has so certified to the circuit court, the prosecuting attorney has no authority to file an information, and a return by order of the court, made after such filing, will not give the court jurisdiction to proceed on said information. 368 (9).

INFORMATION.

3. Under an information charging the respondent with an assault with intent to murder, he may be legally convicted of the lesser offense of an assault with intent to do great bodily harm less than the crime of murder. 178 (1).
4. The amendment of an information for bigamy by leave of the court on calling the case for trial, by changing the name of the county where the first marriage is alleged to have taken place to that of another county in the same state, is not improper, no claim being made that such amendment necessitated a continuance to enable the respondent to go to trial safely. 184 (1).
5. While there are some reasons why the place as well as time of the first marriage should be given in an information for bigamy, it is apparent that the only important fact is the existence of the two marriages. *Id.* (2).
6. While fairness requires that no needless delay should occur in placing on the information the names of known witnesses, yet it cannot be made an absolute requirement in cases of such a nature as the present, where the prosecution cannot compel attendance. *Id.* (4).
7. The court may properly permit the prosecuting attorney to indorse the name of the complaining witness, whose testimony was taken on the preliminary examination, upon the information after the jury is sworn, he having failed to make such indorsement through inadvertence; but if the respondent makes a reasonable claim that he is not prepared to meet the testimony expected to be given by said witness, he should be allowed a reasonable time to prepare his defense. 367 (1).

JURY.

8. The question whether a warrant has been issued and delivered to an officer, if in dispute, is for the jury. 116 (6).
9. Where, after a jury is sworn, the case is continued for some

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CRIMINAL LAW.—Continued.

weeks, and the jury allowed to separate, and on their re-assembling the respondent is permitted to challenge jurors for cause, a challenge to a juror who admits that he has heard some talk about the case upon both sides, which he could not narrate, having heard so many stories, but that he had heard people talking about the public sentiment about the case, in which conversations he took no part, and did not think he had been influenced thereby, should be allowed. *Id.* (3).

10. Where, in such a case, one of the jurors denied stating to a certain person, since the continuance of the case, that he believed that the respondent was guilty, the respondent should be allowed to call the person named to establish the fact, and if, after hearing his evidence, the court entertains any doubt on the subject, a challenge for cause should be sustained. *Id.* (4).

11. It is error for the court, on the trial of a respondent for rape, where the whole theory of the defense is that the charge of the prosecutrix is fabricated, to instruct the jury upon the theory that the respondent claims a want of sufficient resistance on her part to constitute the offense, as shown by her failure to make an outcry or resistance at the time, or complaint afterwards, which evidence was drawn out upon her cross-examination. 368 (8).

CONTINUANCE.

12. Where on the trial of a father for an alleged rape upon his daughter the name of the daughter is indorsed upon the information as a witness after the jury is sworn, the request of the respondent for a continuance over the term should be granted, he claiming to be unprepared to meet her testimony; and it is error to continue the case for a number of weeks, and allow the jury to separate and return and try the case, the respondent not consenting to such continuance, and objecting to said trial. 367 (2).

EVIDENCE.

13. This case is ruled by *People v. Petheram*, 64 Mich. 252, there being evidence (see opinion) from which the jury could infer malice, it being the natural inference from the facts proved. 172.

14. The deposition of a respondent, taken upon his preliminary

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CRIMINAL LAW.—Continued.

examination, may be introduced in evidence by the prosecution upon the trial. 178 (2).

15. It is quite possible for a valid marriage to be shown with no means to show its time and place, and this is especially true of marriages in distant places. 184 (3).

16. There is no question that the testimony of eye-witnesses to a marriage is more direct and reliable in most cases than documentary evidence, which has never been regarded as in law the best evidence. *Id.* (5).

17. A witness who swears to seeing a man and woman joined together by a marriage ceremony, performed seriously and in earnest, by a person acting in the character of a clergyman or magistrate, testifies to what is a valid marriage, unless clearly made illegal by statute. *Id.* (6).

18. According to all rules of law, official character, whether lay or clerical, can be shown presumptively by reputation. *Id.* (7).

19. While there may be countries where marriages are void unless solemnized by a person having actually the authority to perform them, such is not the general rule, and such is not our law. *Id.* (8).

20. Where, on the trial of a father for an alleged rape upon his daughter, she is the sole witness for the prosecution, and is contradicted by the father, and does not deny having stated to third parties that the charge sworn to was untrue, they having testified to such statements by her, evidence of her having repeatedly made similar accusations against her brothers and other persons, and afterwards admitted their falsity, is admissible, as tending to show a morbid condition of mind or body, and as explaining the charge made against the father. *Id.* (5).

21. The failure of a respondent to offer affirmative evidence of his good character raises no legal inference that he is guilty of the offense charged, or that his character is bad, and it is the gravest error for the court to permit the prosecuting attorney to comment upon the absence of such testimony, which is not cured by an instruction to the jury not to consider such argument. 368 (6).

CHARGE TO JURY.

22. If any of the testimony, as given by the people's witnesses,

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CRIMINAL LAW.—Continued.

is especially referred to and narrated in the charge to the jury, the testimony and explanations relating to the same subject on the part of the respondent should also be referred to. 10 (3).

23. In the absence of any requests from counsel, it is the duty of the circuit judge to see to it that the case goes to the jury in a clear and intelligent manner, so that they may have a clear and correct understanding of what it is they are to decide, and he should state to them fully the law applicable to the facts; and especially is this his duty in a criminal case. *Id.* (4).

See JURY, *ante* (11).

NEW TRIAL.

24. While this Court cannot reverse a judgment or set aside a verdict upon a review of the facts, when properly submitted to the jury, and will not ordinarily depart from such rules of practice as have been adopted as the result of the longest experience, yet, under its general superintending power and control over all inferior courts, and their proceedings, given under its appellate jurisdiction, in a criminal case, upon a review of all the proceedings which have resulted in a conviction, if the Court can see that the respondent has not had a fair trial, and it is made manifest that injustice has been done, it becomes the imperative duty of the Court, with or without objections and exceptions by the respondent's counsel, to set aside such proceedings, and order a new trial, and the present presents such a case. 10 (2).

SENTENCE.

25. While the intoxicated condition of a respondent at the time of the commission of an alleged rape cannot furnish any legal excuse for what he did, it has an important bearing upon his turpitude and the quality of his crime, and should have an important influence in determining the extent of the punishment to be inflicted. 10 (1).

26. Where the punishment for an offense is for a term of years, to be fixed by the judge, it should never be made to extend beyond the average period of persons in prison life, which seldom exceeds 25 years. *Id.* (5).

27. How. Stat. § 2275 (providing for the punishment of violators of the liquor law), contemplates an *immediate* impris-

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CRIMINAL LAW.—Continued.

onment, which may continue 90 days, with or without payment of the fine and costs. 59 (1).

28. It is no ground of error that a sentence is *less* than it might have been, so long as it does not involve a different kind of punishment than that allowed by law. *Id.* (2).

PROSECUTING ATTORNEY.

29. Where a prosecuting attorney had instructed a justice to entertain actions where security for costs had been filed, and named an attorney whom he desired to represent him, who appeared at the request of the justice, and conducted the trial of a case before him in which such security had been filed, such action is no ground for reversal on *certiorari*, it not appearing that the attorney appeared for, or was acting in the interest of, any private party, and no objection being made to his appearing. 175 (1).

30. Where an attorney appointed on the request of the prosecuting attorney to assist in the prosecution of a criminal case testifies that he is acting under an agreement that the prosecutor shall pay him for his services, and that he has received no money, nor made any arrangements to receive any, from any other person, there is no rule making it necessary to exclude him. 185 (10).

31. It is error to allow a prosecuting attorney, after a jury in a criminal case in justice's court have announced their inability to agree, to question them as to the cause of such disagreement, and to read law to them, and state to them what verdict they may legally render, the defendant not consenting but objecting to such action. 181.

32. This Court has upon numerous occasions been called upon to express its opinion upon the conduct of prosecuting officers in the prosecution of criminal cases, and has often laid down the rule that it was their duty, as well as the duty of the court, to see that the accused had a fair and impartial trial. They are not the attorneys of the complaining party, but represent the people, who are as much interested to protect the innocent as in the conviction of the guilty. 368 (7).

STATUTE OF LIMITATIONS.

33. Making a complaint in a criminal case is not such a commencement of suit as will prevent the running of the statute of limitations. 116 (1).

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CRIMINAL LAW.—Continued.

84. In order to commence a criminal prosecution, there must not only be a complaint on oath, but a warrant must be issued by the justice, and placed in the hands of an officer for service. *Id.* (3).

85. How. Stat. § 9507, deducting from the statutory period of limitation the time during which the party charged was not usually or publicly a resident within this State, does not apply to prosecutions for seduction. *Id.* (4).

86. Our statutes provide for the prosecution of offenders who are fugitives from justice, and there is no difficulty in commencing a prosecution for seduction within the statutory year when the offender flees from justice. *Id.* (5).

See CERTIORARI (1).

CROSS-EXAMINATION—See EVIDENCE (4–7).

DAMAGES.

This case involves the alleged failure of defendants Leaton and Upton to perform a contract for the manufacture and sale of lumber, which performance was secured by a lien upon the lumber, and the Court find such breach, and decree that said defendants shall pay to complainant the difference between the contract price of the lumber sawed and the cost of replacing it. 586.

DEBATES—See CONGRESSIONAL DEBATES.

DECREE.

1. The testimony in this case was taken under an order directing proofs to be taken "relating to matters in controversy between the parties necessary or proper to be determined for the purpose of ascertaining and determining the principles upon which the accountings in this case, or any of them, should proceed." This order was liberally construed by all parties. Complainant, the representative of the surviving partner, undertook to state an account, and gave testimony on every item therein. Nearly 10,000 pages of testimony were taken, and it appeared that all the information that was obtainable was thus brought before the court.

Held, that notwithstanding the technical form of the order of reference, a final decree would be rendered, if in so doing justice between the parties could be attained. 460 (20).

2. It is the effect of the order or decree, and not its form or particular classification which determines the right to appeal. *Id.* (21).

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DEDICATION.

Proof of the acceptance of the land dedicated by its owner to the public use must be unequivocal and convincing. 249 (5).

See EQUITY (3); TOWN PLATS.

DEED.

A covenant against incumbrances, made after the assessment of benefits by a drain commissioner, but before the supervisor has extended the tax, is broken as soon as made. 336 (4).

See DURESS.

DEFEASIBLE PURCHASES.

Defeasible purchases are narrowly watched, and courts of equity always favor the right of redemption. 645 (1).

DEFINITIONS.

1. Forest products. 18 (2).
2. Ordinary expenses of a township. 100 (5-7).
3. Lot. 249 (4).
4. Insurance contract. 604 (3).

DEMAND OF PAYMENT.

When the omission to make demand for a claim against a debtor may be taken as a circumstance against its existence, depends upon the circumstances of each particular case; but testimony showing such omission is always *competent*, and the question is one for the jury. 630 (4).

See EVIDENCE (8).

DEPOSITION—See CRIMINAL LAW (14).

DOG—See PLEADING (5).

DOMICILE—See ELECTIONS.

DRAINS.

1. Drain taxes assessed under the provisions of chapter 40, How. Stat., became a lien as soon as they became a charge on the land, by the assessment of benefits made by the drain commissioner. 336 (1).
2. Under chapter 40, How. Stat., the assessment was made by the drain commissioner, and the action of the supervisor was merely ministerial, for the purpose of collection; he having no authority to change or modify such assessment, nor to review it in any manner, but his duty simply being to levy

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DRAINS.—Continued.

the amount assessed by the drain commissioner upon his tax roll. *Id.* (2).

3. Under the drain law of 1881 (chapter 40, How. Stat.) the mere delay of the drain commissioner to present the assessment list to the supervisor, or of the supervisor in extending it upon the tax roll, did not invalidate the lien attaching to the land from the time of the assessment of benefits by the drain commissioner. *Id.* (3).

4. A covenant against incumbrances, made after the assessment of benefits by a drain commissioner, but before the supervisor has extended the tax, is broken as soon as made. *Id.* (4).

DURESS.

The deed sought to be set aside is held to have been procured through threats, in executing which the grantor acted under a species of duress, and the relief prayed for is granted. 109.

ELECTIONS.

1. Where the only question of the residence of a voter for purposes of election is whether his lodging room or his boarding place governs, he should be registered where he boards. 398 (1).

2. The following propositions are summarized from the opinion of Mr. Justice CAMPBELL:

a—There can never, in the eye of the law, be more than one domicile of citizenship; and that continues, in the case of a citizen, till he himself renounces it absolutely, and takes up another in its stead; and such a domicile is not lost by absence in the State or out of the State, whether within or without the United States.

b—Mere bodily presence or absence can have no effect in determining residence, when once existing.

c—Temporary abode in a city or ward does not make a person an elector. Unless the person coming in does so with the honest and settled intention of obtaining a new domicile, he gains no rights.

d—It is always to be remembered that a citizen who has elected his domicile is entitled to enjoy it. The only question is as to the particular action which indicates his choice.

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ELECTIONS.—Continued.

e—The family or householder, whether composed only of relations, or including, as it commonly does in law, all the members of the household, is the natural group of fellow-residents.

f—Where long and inveterate usage has existed for half a century unchanged, it is of itself, unless repugnant to some principle, of great force as a public custom.

g—It must be remembered that the right of voting is one which cannot be taken away by direct law or impossible conditions.

h—The primary rule of elections must always be to save the voter his rights.

i—No one who is not a *bona fide* resident can eat himself into the quality of a voter. The period of residence required means actual and permanent sole residence, and not a few days' commorancy for the purposes of one election. A temporary resort to a precinct for no other honest purpose of residence is a fraud, and no residence, and gives no rights. 398, 399 (2).

EQUITY.

1. The rule that "equity aids the vigilant, and not those who slumber on their rights," is designed to promote diligence on the part of suitors; to discourage laches, by making it a bar to relief; and to prevent the enforcement of stale demands of all kinds, wholly independent of the statutory periods of limitation. 86 (2).
2. A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where a party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. *Id.* (3).
3. In this case, it is held that the testimony fails to show either a dedication or an acceptance of the land in dispute, as a street; and that the complainant shows itself in possession of said land, claiming title, and, as against an intruder who threatens to enter and dispossess it for the purposes of a public street or highway, it shows a right to equitable relief by injunction. 250 (6).
4. Courts of equity always favor the right of redemption, and defeasible purchases are narrowly watched. 645 (1).

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EQUITY PRACTICE.

1. The lack of the signature of the defendant to his answer is a fatal defect on motion to strike from the files, if not waived by replication. 43 (1).
2. A bill seeking to have settled in equity matters capable of enforcement at law should be verified, and when such relief is asked by a defendant in his answer, under rule 123, the answer *must* be verified. *Id.* (2).
3. The practice in this State on bills to redeem has long been settled against strict foreclosure in case of default, unless in very peculiar cases. 194 (2).
4. Where an order of reference to take proofs necessary to determine the principles upon which the accountings in the case should proceed has been so acted upon as to furnish the basis for a final decree, just to all parties, the technical form of the order will be disregarded, and a final decree entered. 460 (20).

EVIDENCE.

BOOKS OF ACCOUNT.

1. In a suit upon a township treasurer's bond, his books are competent evidence to show his indebtedness to the township. 1 (1).
2. A supervisor who took part in a settlement with a township treasurer, and examined his books and vouchers, may testify to the amount found due the township. *Id.* (2).

CONTENTS OF PAPER.

3. A question giving the contents of a paper which a witness is being interrogated about, and which is not introduced in evidence, is incompetent. 135 (4).

CROSS-EXAMINATION.

4. Where the execution of a note is denied by the defendant, and the agent who claims to have taken it for the plaintiff swears that he was present and saw the defendant sign it, he may be cross-examined fully as to all that took place at the time of such alleged signing. 265 (1).
5. In a suit upon a note, the execution of which is denied by the defendant, he may show by the cross-examination of an agent who claims to have taken it for the plaintiff, and who swears to its execution by the defendant, as affecting the credibility of the witness, the negotiation by him prior to

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EVIDENCE.—Continued.

the date of the note in suit of another forged note purporting to be signed by the defendant, which testimony is also admissible as tending to show that the witness obtained the note in suit fraudulently. *Id.* (3).

6. Facts relating to the matters given in evidence on the direct examination of a witness, and which have an important bearing upon the issue, may be shown on his cross-examination. 623 (1).

7. Where a defendant, sued for commissions claimed by plaintiff as due him on a sale of land, defends on the theory that he has paid the agreed commissions to another real-estate agent, by direction of the plaintiff, and that the two were to make a division of the same, and the second agent testifies that he received the money under such an arrangement, which he has not carried out, he may be asked on cross-examination why he has not paid plaintiff his share of the money. 669 (3).

DEMAND OF PAYMENT.

8. When the omission to make demand for a claim against a debtor may be taken as a circumstance against its existence, depends upon the circumstances of each particular case. Among business men in cities, transacting large amounts of business, claims are liquidated every few days, and settlements are made on short time, and the presumption arises much sooner than in the country, where longer credits are usually extended; but in *all* cases the testimony is *competent*, and the question is one for the jury. 630 (4).

FACT WITHIN KNOWLEDGE OF DECEASED PERSON.

9. Until testimony necessarily shows that a fact must have been equally within the knowledge of a deceased person, it ought not to be excluded under the statute making such evidence incompetent in certain cases. 630 (3).

HANDWRITING.

10. Where expert witnesses testify, entirely from comparison, to the genuineness of a disputed signature, it is competent on cross-examination, for the purpose of testing the value of their testimony, to show them other signatures properly in evidence, purporting to be made by the same person, and by their comparison of the same to show that they differ radi-

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EVIDENCE.—Continued.

cally in their views of the similarity of letters, and that they might be easily mistaken in their assumptions from such a comparison; and the fact that the witnesses do not know whether the latter signatures were made by one man or two but adds to the value of the test. 266 (4).

IMPEACHMENT.

11. Where an agent for a harvester company went with a debtor of his to the house of a party who had given said debtor a note for "Bohemian oats," and by agreement between the three the Bohemian-oat note was surrendered, and a note for the same amount given by the payor to the harvester company upon one of its printed blanks, purporting to be for a machine sold to the payor, and in a suit by the company upon the note the agent testifies to its execution, and on his cross-examination denies having any knowledge of the consideration for the note in place of which it was taken until after such exchange, he may be asked if he has not stated out of court that he had such knowledge, and if he denies making such statements the defendant may prove them as a part of his defense. 265 (2).

MARRIAGE.

12. A paper purporting to be a certificate of a marriage solemnized in another state, and certified by the clerk of the county to be a true and perfect copy of such certificate as the same appears from the records in his office, but which is not certified as required by the act of Congress, and does not conform to any rule of this State on the subject, is inadmissible as evidence of such alleged marriage in this State. 185 (9).

OPINION EVIDENCE.

18. In a case involving the question of whether a booming company properly managed its business of log driving during a given season, a witness who is shown competent to testify on the subject may aid the jury by giving his opinion whether the work was properly done or not. 134 (2).

SALE.

14. Where the fact of a sale of goods was not disputed, but the controversy was as to its terms, the testimony of the

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EVIDENCE.—Continued.

agent who made the sale that he sold the goods to the defendant for a price named is not incompetent as stating a conclusion of law. 599 (1).

15. In a case involving a sale of goods claimed by the defendant to have been made on time, which was denied by the plaintiff, evidence of the financial standing of the defendant at or about the time of the sale is admissible. *Id.* (4).

16. Where the sale and delivery of goods is undisputed, but the contest is over the terms, the vendor claiming it to have been for cash and the vendee upon credit, proof of such sale and delivery raises a presumption that the sale was for cash, and the burden is upon the vendee to establish the contrary. *Id.* (6).

SAWING CONTRACT.

17. Where a contract for cutting and manufacturing logs into lumber provides that the product only is to be measured "when shipped," there is no occasion for a "woods scale," and testimony showing the amount of *logs cut* is immaterial. 167 (1).

SETTLEMENT.

18. It was competent for plaintiff to testify whether the alleged settlement with defendant was final, that point being one on which defendant raised a dispute; and had himself testified. 168 (3).

MISCELLANEOUS.

19. In a suit against a booming company for obstructing a river, and thereby preventing the plaintiff from putting his logs into the river by July 1 of a given year, as he had contracted to do, the manner in which he did his job, or at what time he did it, whether within the contract or not, is no concern of the defendant, and could have no effect, by way of excuse or otherwise, for any obstruction to the right of passage to plaintiff's logs down the stream. 135 (3).

20. In this case it is held that it was competent for the plaintiff to show why the notes for the alleged balance due him from the defendant were, for the purposes of discount, made nominally by plaintiff to defendant's order. 167 (2).

21. A question calculated to raise improbabilities in favor of the party asking it is proper. 599 (3).

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EVIDENCE.—Continued.

22. Where a letter written by the defendant to the plaintiff, and relating to the subject-matter of the suit, is offered in evidence by the plaintiff, upon which appears an unsigned memorandum not so relating, and not written by the defendant, and the author or purpose of which does not appear, the memorandum is no part of the letter, and immaterial as evidence in the case. *Id.* (5).

23. In a suit by executors upon a verbal contract claimed to have been made with defendants by their testator, the making of which is denied, it is the right of the defendants to put before the jury every fact and circumstance having any tendency to show, or raise the presumption or probability, that such contract never existed. 630 (1).

24. Contracts for repurchase, made contemporaneously with conveyances of real estate, absolute in form, are sometimes strong evidence tending to show that the conveyances are intended to be mortgages. 645 (3).

See ADVERSE POSSESSION (2); BURDEN OF PROOF; CRIMINAL LAW (18–21); DEDICATION; FIRE INSURANCE (3).

EXECUTION OF NOTE—See EVIDENCE (4, 5, 11).

EXECUTORS AND ADMINISTRATORS.

1. An executor's obligation to account in the proper court rests, on his decease, upon his personal representative, who should observe the same rules in so doing as the executor, and should be held to the same strictness, so far as he has knowledge, or with a reasonable degree of diligence can obtain the same. 455 (4).

2. On the death of a surviving partner, who was also executor of the estate of his deceased partner, the representative of the former has no more right to the exclusive control of the copartnership books, papers, and property of the partnership estate than has the representative of the deceased partner. *Id.* (5).

See EVIDENCE (23); TRUSTEES; WILL.

EXPERT TESTIMONY—See EVIDENCE (13).

FILES.

There is no rule of law which authorizes any but the parties interested to handle the files or publish the contents of their matters in litigation. 560 (4).

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FINANCIAL STANDING—See EVIDENCE (15).

FINDINGS OF FACT.

The want of necessary findings of fact is ground for reversal. 363 (2).

FIRE INSURANCE.

1. Policies of insurance issued by a mutual fire insurance company incorporated under Act No. 82, Laws of 1873, *outside* of the territorial limits fixed by said act, are issued without authority, Act No. 175, Laws of 1883, supposed to authorize such action having been declared unconstitutional in *Skinner v. Wilhelm*, 63 Mich. 568. 651.
2. The shutting down of a shingle-mill for 42 days for want of logs which were *in transit*, and detained by reason of low water, but which were daily expected to arrive, and which began to be delivered the day the mill was burned, will not avoid a policy of insurance providing for such a result in case "the mill shall cease to be operated" without notice to or consent of the insurance company. 654 (1).
3. In such a case it is proper for the plaintiff to show that a planing-mill owned by the insured, and distant from the shingle-mill about 125 feet, and connected with it by cable power which operated both mills, was kept in operation, and that other mills were shut down the same season on account of low water, thus showing that such stoppages were incident to and to be expected in that locality. *Id.* (2).

FIRE LIMITS.

The non-enforcement of an ordinance establishing fire limits will not render a city liable for damages resulting therefrom. 278.

FRAUD.

The language used in that portion of the charge of the court quoted in the opinion is held to have been misleading, and to have given the jury the impression that the language of the request repeated in the charge was adopted by the court, and that they were instructed that everything should be so clear and conclusive as to leave no rational doubt in their minds as to the existence of the fraud charged. 301.

See PRINCIPAL AND AGENT (2).

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FRAUDULENT CONVEYANCES.

1. It is well settled in this State that a wife has a right to bargain with her husband for any amount due her from him, and may take a deed directly from him in settlement of such claim. 347 (1).
2. It was held in *Dull v. Merrill*, 69 Mich. 49, that a wife will not lose her rights as a creditor of her husband by failing to make her claim known, even as against a party who trusted the husband in ignorance of such claim. *Id.* (2).
3. A voluntary conveyance is not void as to creditors, even though the grantor is indebted at the time, if he retains ample means to pay his debts. *Id.* (3).
4. In a suit to set aside a deed by a husband to his wife as fraudulent as to creditors, the fact that the land was assessed to the husband for several years after the execution of the deed, and while it was unrecorded, can have no weight, it appearing that he attended to his wife's business affairs, and paid the taxes from the products of the land. *Id.* (5).

FUGITIVE FROM JUSTICE—See CRIMINAL LAW (36).

GOOD CHARACTER—See CRIMINAL LAW (21).

GUARDIAN AND WARD.

It is the duty of one assuming to act as guardian of a minor, and the only son of his deceased partner, whose executor he also is, to look after his habits and education, and to secure for him the best advantages for business instruction, and at least to give him such an insight into the estate of his father, and such instruction in relation thereto, as will best qualify him for its successful management. 456 (8).

HANDWRITING—See EVIDENCE (10).

HIGHWAYS.

Under How. Stat. § 1331, the opinion of the commissioner of highways as to the cost of repairing a bridge must prevail, and *mandamus* will not be granted to compel such repairs, on his own motion, where in his return he shows that in his opinion the cost of the same will exceed $1,000. 152.

See TAXES (13, 21-23).

HOMESTEAD LAWS.

1. There is no act of Congress allowing undivided interests to be granted either to homesteaders or pre-emptioners. 43 (5).

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HOMESTEAD LAWS.—Continued.

2. Section 2292 of the Revised Statutes of the United States covers every case where there are minor children surviving *both* parents, and in terms gives them the *entire* estate in an uncompleted homestead entry to the exclusion of the adult children. *Id.* (6).

HUSBAND AND WIFE.

1. A wife has a right to bargain with her husband for any amount due her from him, and may take a deed directly from him in settlement of such claim. 347 (1).
2. A wife will not lose her rights as a creditor of her husband by failing to make her claim known, even as against a party who trusted the husband in ignorance of such claim. *Id.* (2).

IMPEACHMENT—See EVIDENCE (11).

IMPROBABILITIES—See EVIDENCE (21).

INCOMPETENT PERSON—See CONTRACT (2–4).

INCUMBRANCES—See DRAINS (4).

INFORMATION—See CRIMINAL LAW (2–7).

INSANITY—See CONTRACT (3).

INSURANCE—See BENEFIT ASSOCIATIONS; FIRE INSURANCE; INSURANCE CONTRACT; MARINE INSURANCE.

INSURANCE CONTRACT.

An insurance contract is an agreement by which one party, for a consideration, promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest. 604 (3).

INTEREST.

Interest cannot be allowed upon a claim for expenses paid, as claimed, by reason of the wrongful act of the defendant, the existence of which claim is only determinable by the verdict. 135 (6).

See TRUSTEES (3–5).

INTOXICATION—See CRIMINAL LAW (25).

IN TRANSIT.

See charge of court, on question of when saw-logs are to be

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IN TRANSIT.—Continued.

considered in transit for the purposes of taxation, in *Hill v. Graham*, 666, 667.

JOURNAL—See LEGISLATIVE JOURNALS.

JUDGMENT CREDITOR'S BILL.

An order requiring an insolvent debtor, proceeded against under a judgment creditor's bill, which has been taken as confessed, to pay over to the receiver a sum of money which his disclosure shows he has drawn from the business of a firm of which he claims to be a member, and to settle which question he has instituted a suit for an accounting, which order directs the receiver to hold the money subject to the order of the court, and allows the creditors of said firm to take such legal proceedings as they see fit to establish their claims to the money, will not be disturbed on appeal. 56.

JURY.

1. A juryman may be asked which side he would be inclined to favor if, at the close of the testimony, it was equally balanced as between the parties, to ascertain his bias, if any exists, to aid counsel in determining as to the exercise of his right to a peremptory challenge. 1 (4).
2. The question whether a warrant has been issued and delivered to an officer, if in dispute, is for the jury. 116 (6).
3. No man who is so prejudiced against another or his business that his prejudice will, of itself, prevent him from doing justice to the testimony of the person against whom such prejudice is entertained, ought to sit as a juror in any case where such person is a party, and in which his liberty or property rights are involved. 122 (5).
4. In a suit involving the alleged *illegal* sale of liquor, a juror is subject to challenge for cause who swears on his *voir dire* that he has a prejudice against the sale of liquor. 285 (1).
5. One who believes that "a minor is as able to buy a glass of beer as a man of forty," and confesses in the jury-box that he is not in favor of enforcing the law prohibiting such first-named sale, is not a proper juror in a case involving the alleged violation of said law, although upon inquiry by the court he states that he thinks he can render a verdict in accordance with the law and evidence. *Id.* (2).

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JURY.—Continued.

6. The peremptory challenge of a juror, after a challenge for cause has been erroneously overruled, will not cure the error where it appears that the party so challenging exhausted his peremptory challenges, as he may have been thereby obliged to retain a juror whom he would otherwise have excused. *Id.* (8).

7. Fairness to parties litigant demands that the jury should be free from bias and prejudice in all cases, and that they enter upon the trial with a single desire and purpose of doing equal and exact justice between the parties, and that according to the law and the evidence given them in open court; and when a juror confesses himself prejudiced against the enforcement of the law or against the party, he is not a fair juror, and should not be permitted to sit in judgment upon the rights of others who are seeking redress under and according to law. *Id.* (4).

See RAILROAD COMPANIES (1); REQUESTS TO CHARGE.

KNIGHTS OF HONOR—See BENEFIT ASSOCIATIONS (2–4).

LABOR CLAIMS—See PUBLIC BUILDINGS.

LACHES.

On consideration of the circumstances of this case, it is found that no laches are imputable to the representatives of the deceased partner in pressing their claims for an accounting against the surviving partner. 458 (16).

See EQUITY (1, 2).

LAND CONTRACT.

In this case an assignment of a land contract is held a mere mortgage, and redemption is decreed as against the assignee, who had procured a deed and taken possession, on payment of the amount of his claim, and some taxes he had paid, less the rental value of the premises during his unlawful occupancy. 194 (1, 3).

LATENT DEFECT—See SALE (1).

LEASE.

Where the exclusive possession of land occupied by leased buildings is necessary to the enjoyment of the demise, the land passes as an incident. 438 (1).

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LEGISLATIVE JOURNAL.

Without determining how far the legislative journals may be used to impeach duly authenticated acts of the Legislature, the courts certainly ought to have the right to open said journals to ascertain whether the fraud or mistake of some clerk or employé of the Legislature, or its committees, has not imposed upon the statute-books a different law from the one actually passed, or to determine whether the requisite number of votes were given under the Constitution to pass a law, when that instrument requires that the ayes and noes shall be entered upon the journals. 446 (2).

LIBEL AND SLANDER.

1. In an action for libel the plaintiff may show that various other persons called his attention to the libelous article. 560 (2).
2. The mischief of a libel consists in the fact that it is actually seen by third persons, and the circulation of a paper is allowed to be shown, as making it probable that the article has been read by several persons. *Id.* (3).
3. There is no rule of law which authorizes any but the parties interested to handle the files or publish the contents of their matters in litigation. *Id.* (4).
4. One of the reasons why parties are privileged from suit for accusations made in their pleadings is that their pleadings are addressed to courts where the facts can be fairly tried, and to no other readers. *Id.* (5).
5. The public have no rights to any information on private suits till they come up for public hearing or action in open court; and, when any publication is made involving such matters, they possess no privilege, and the publication must rest on either non-libelous character or truth to defend it. *Id.* (6).
6. It has been uniformly held that the public press occupies no better ground than private persons publishing the same libelous matter, and, so far as actual circulation of libels is concerned, there can be no question which is more likely to spread them. *Id.* (7).
7. Any one, whether reporter or otherwise, who undertakes to give to the public the contents of a document which speaks for itself, and in which he has no personal concern, is bound, if he would reduce his liability, to use such a degree of care as is

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LIBEL AND SLANDER.—Continued.

reasonably sure to prevent mistake, and to publish nothing not so obtained which will inure to the injury of another. *Id.* (8).

8. The following propositions are summarized from the opinion of Mr. Justice CAMPBELL:

a—When a man is charged with doing what if done by him can be nothing else than a crime, it cannot be said not to involve a criminal charge because other persons might not be so guilty.

b—It is the thing charged on the person libeled as done by him, and not by some one else, which makes the libel. It must especially injure him, if believed, among those who know him personally, and if to them the charge made involves a crime, the degree of which makes it disgraceful, it involves it none the less because the publisher did not so consider it by mistake of fact or law.

c—There is no room for holding in a constitutional system that private reputation is any more subject to be removed by statute from full legal protection than life, liberty, or property. It is one of those rights necessary to human society that underlie the whole social scheme of civilization. It is a thing which is more easily injured than restored, and where injury is capable of infinite mischief; and, on the other hand, it is one where the injury is frequently, and perhaps generally, aggravated by malice. The law has therefore always drawn distinctions between intentionally false and wicked assaults on character, and those which were not actually designed to create a false impression, although necessarily tending to injure reputation if false in fact, but it has made both actionable.

d—It is not competent for the Legislature to give one class of citizens legal exemption from liability for wrongs not granted to others; and it is not competent to authorize any person, natural or artificial, to do wrong to others without answering *fully* for the wrong. *Id.* (9).

See CONSTITUTIONAL LAW (8).

LIEN—See DRAINS (1, 3, 4).

LIFE INSURANCE.

This is a case involving alleged false answers by an applicant for life insurance to questions regarding past sickness and

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LIFE INSURANCE.—Continued.

medical attendance, and it is held that the facts as to what was asked and answered rest in the conflicting proofs, and that the jury must have found that the agent put down answers that the applicant never made, and that she did not know that she was signing any such statements, and the case is held not to differ in principle from *Brown v. Ins. Co.*, 65 Mich. 306, or from other cases involving similar questions, and the judgment against the defendant is affirmed. 388.

See BENEFIT ASSOCIATIONS.

LIQUOR TRAFFIC.

1. How. Stat. § 2275, contemplates an immediate imprisonment, which may continue 90 days, with or without payment of the fine and costs. 59 (1).
2. The statute giving a right of action to the wife or other person "injured in person or property or means of support by any intoxicated person, or by reason of the intoxication of any person," is broad enough to include the widow, who must be considered "a person," and who is certainly injured in her "means of support" by the death of her husband *from* intoxication, or *by reason of* the intoxication of himself or another person. 122 (1).
3. Under the statute giving a right of action for injury occasioned by an intoxicated person, it is not for the injured party to produce proof, or for the jury to speculate, upon the probabilities whether the intoxication was the natural cause of the act which caused the death. The *act* itself fixes the liability for the damages upon the person selling or furnishing the liquor which caused the intoxication. *Id.* (2).
4. In a suit by a widow for damages resulting from the death of her husband from injuries received at the hands of an intoxicated person, evidence of the habits of the husband as a drinking man previous to the date of his injury is pertinent as bearing upon the question of damages; and proof that he was peaceable and quiet when sober, and noisy and quarrelsome when drunk, is also admissible, as bearing upon the question of his intoxication at the time, and whether such intoxication contributed to his injury and death. *Id.* (3).
5. It is error to exclude, as an element in the computation of damages to be awarded a widow for loss of support by rea-

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LIQUOR TRAFFIC.—Continued.

son of the death of her husband, *his* life expectancy, and ability during *such* period to support his wife. *Id.* (4).

6. A sale of liquor to a minor under the age of 18 years gives a right of action for damages under Act No. 92, Laws of 1877, which cannot be lessened by the fact of sales by others to the minor, and proof of such sales is inadmissible in such a case. 285 (5).

7. In a suit under Act No. 92, Laws of 1877, to recover damages for the sale of liquor to a minor under the age of 18 years, proof of such sale entitles the plaintiff to $50 actual damages at least, and to such exemplary damages as the jury see fit to award under all the circumstances of the case, not exceeding the amount claimed in the declaration. *Id.* (6).

See JURY (4, 5).

LOG-RUNNING COMPANIES.

1. Under the statute providing for the organization of log-running and booming companies, the corporation has the right on the streams where it can lawfully do business to construct, use, and maintain all necessary booms for that purpose, the location, extent, manner of construction, and number of which is left to its own determination, subject to the statutory restriction that, so far as practicable, they must be constructed and used in such a manner as to allow the free passage of boats, vessels, crafts, logs, lumber, timber, or other floatables along the stream. 134 (1).

See EVIDENCE (13).

LOST SECTION CORNERS—See TAXES (12).

LOT.

One of the ordinary meanings of the word "lot" given by lexicographers is "that portion of ground which is allotted or assigned to any one, and hence a distinct portion of land." 249 (4).

MALICE—See CRIMINAL LAW (13).

MANDAMUS.

Mandamus will not lie to compel a commissioner of highways to repair a bridge, on his own motion, where his return shows that in his opinion the cost will exceed $1,000. 152.

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MARINE INSURANCE.

1. An abandonment once made and accepted fixes the rights of the parties, and renders the insurers liable as for a total loss. 571 (1).

2. Where, upon receiving notice of the abandonment of a vessel by the owners, the insurers take her in charge, put her in the dry-dock, and cause her to be repaired at an expense exceeding one-half of her value, and do not return, or offer to return, the vessel to the owners, these acts amount to an acceptance, and the title passes to the insurers. *Id.* (2).

3. On receiving notice of the abandonment, the insurers have a right to refuse acceptance until they make inquiry into the cause of the accident, and if it was occasioned by any peril not insured against, or by neglect of parties having the vessel in charge for the owners, or because of her unseaworthiness, or of other causes excepted in the policy, their liability will not attach; but they cannot accept the vessel and defer these inquiries until after suit is brought, and then for the first time set up a claim that their acceptance is not conclusive. *Id.* (3).

4. A notice that an insured vessel is ashore at a stated place, and that the owners abandon the boat, and claim a total loss, with request to the agent to whom the notice is directed to inform the underwriters, is a sufficient notice of abandonment. *Id.* (4).

5. By the well-established principles of marine insurance a deed of abandonment is not essential to the rights of either party, as the title passes, and the property vests in the insurer, immediately on abandonment. No particular form of notice is necessary, and, unless required by the policy, it need not be in writing. *Id.* (5).

MARRIAGE—See CRIMINAL LAW (4, 5, 15, 16, 19); EVIDENCE (12).

MARRIED WOMAN.

It was held in *King v. Merritt*, 67 Mich. 217, that a married woman was relieved from all disability to bring actions in her own right by the Legislature of 1855, being an act in regard to the rights of married women. 86 (1).

MATERIAL MEN—See PUBLIC BUILDINGS.

MEASUREMENT—See EVIDENCE (17).

MEMORANDUM ON LETTER—See EVIDENCE (22).

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MENTAL INCOMPETENCY—See BURDEN OF PROOF (2, 3); CONTRACT (2–4).

MICHIGAN CASES CONSTRUED.

For a construction of the decision in *Lumber Co. v. Collins*, 66 Mich. 64, and in *Dairy Co. v. McKinlay*, 70 Id. 574, see *Hill v. Graham*, 72 Mich. 660 (head-note 2).

MINOR—See GUARDIAN AND WARD.

MISTRIAL.

A judgment will be reversed for want of necessary findings of fact, as for a mistrial. 363 (2).

MORTGAGE.

1. An assignment of a land contract, with a defeasance that if the assignee should be obliged to pay any part of a specified sum for which he had become surety, and the assignor should not repay the same by a given date, the assignee should have absolute ownership in the contract, and if repaid he was to surrender all claim thereto, is a mere mortgage of the land, and no more. 194 (1).
2. The practice in this State on bills to redeem has long been settled against strict foreclosure in case of default, unless in very peculiar cases. *Id.* (2).
3. In this case the defendant took an assignment of a land contract as security, and without a demand of complainants who had succeeded to the rights of the vendee, for the amount due him, demanded and received a deed of the land from the vendor, and then took possession of the premises, and refused complainants' offer to pay the amount secured by the assignment, claiming to be the absolute owner of the property. On this state of facts complainants are allowed to redeem on paying amount of defendant's claim, including some taxes paid on the property, less the rental value of the same during defendant's unlawful occupancy, and are allowed costs of both courts. *Id.* (3).
4. In this case it is held, upon the facts stated in the opinion, that an assignee of a $4,800 interest in a mortgage is entitled to have said claim first satisfied, on foreclosure, as between the assignor and assignee. 304.
5. Defeasible purchases are narrowly watched, and courts of equity always favor the right of redemption. 645 (1).
6. From the mere fact of an agreement to reconvey, either

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MORTGAGE.—Continnued.

with or without an advance in price, an absolute conveyance will not be turned into a mortgage. *Id.* (2).

7. Contracts for repurchase, made contemporaneously with conveyances of real estate, absolute in form, are sometimes strong evidence tending to show that the conveyances are intended to be mortgages. *Id.* (3).

See CHATTEL MORTGAGE.

MUNICIPAL CORPORATIONS.

1. This case involves the right of the city of Detroit, under its charter as existing in 1885, to build a bridge for a crossing over a railroad track, in a public street in said city.

CHAMPLIN, J., filed an opinion, concurred in by LONG, J., *denying* such right, and affirming a judgment recovered by plaintiff for injury sustained thereby in the usual and ordinary enjoyment of his abutting property.

CAMPBELL, J., concurred in the result, as did SHERWOOD, C. J., and MORSE, J., but held, further, that the city may build bridges where necessary for a safe passage, subject always to the payment of damages when it injures private property. 240, 241.

2. Municipal corporations, under their charters and ordinances, do not become insurers of the property within their corporate limits from destruction by reason of the neglect or refusal of their officers and agents to enforce their ordinances. 278.

See BURDEN OF PROOF (1).

NEGLIGENCE.

All who go upon an open railway track do so at their own risk of such dangers as are incident directly to such use. 619 (1).

NEW TRIAL.

1. The weight of authority is decidedly against the granting of a new trial in a court of equity to impeach the testimony of witnesses, or because a party has committed perjury, or even suborned a witness to commit perjury. 61 (1).

2 It is best, as a matter of public policy, that a judgment obtained in a court of law should stand, unless it is manifestly against conscience. In that case,or in a case where a perjury of a witness has been fully established by judicial

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NEW TRIAL.—Continued.

determination, or by written documents, equity may very appropriately deny relief. *Id.* (2).

See CRIMINAL LAW (24).

OFFICIAL CHARACTER—See CRIMINAL LAW (18).

OPINION EVIDENCE—See EVIDENCE (13).

ORDINARY EXPENSES—See TAXES (10–12).

NOTICE TO PRODUCE PAPERS.

A notice to produce letters to be used as evidence on a trial, which are in the possession of the client in another state, and to procure which required that they be forwarded by the next mail after the receipt of telegram to mail them, is unreasonably short. 599 (2).

OWNERSHIP.

The question of the ownership of estimates of timber, made by a land-looker for a land-owner, and paid for by the latter, is one of law. 630 (2).

PAROL EVIDENCE—See EVIDENCE (3).

PAROL TRUST IN LAND.

The purpose of How. Stat. § 6179, providing that no express trust in lands can rest in parol, is to preclude parties from asserting equitable interests in lands where they must rest upon parol evidence in opposition to the written instruments of title which have been made by their consent and approval. 86 (4).

PARTNERSHIP.

1. On the death of a surviving partner, who was also executor of the estate of his deceased copartner, his representative has no more right to the exclusive control of the copartnership books, papers, and property of the partnership estate than has the representative of the deceased partner. 455 (5).
2. Among the indispensable duties and obligations imposed upon a surviving partner, who is also the executor of the last will and testament of his deceased partner, are the following:

a—To file in the probate court, not only a true and correct inventory of the individual property and assets of the estate, but also of the partnership property; and the latter should show who are the partners, the place where the firm carried

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PARTNERSHIP.—Continued.

on business, and the nature and character of the same, the terms of the copartnership, the capital contributed by each partner, and some statement of the assets and liabilities, so far as he knows them, or can ascertain them with any reasonable certainty.

b—To keep accurate and correct accounts of the estate, and all the assets thereof, showing the accumulations or losses thereon, keeping separate and distinct the individual estate from the partnership interest, and to exhibit such account or accounts whenever called upon to the heir or his attorneys, and to all persons interested in the estate.

c—In the shortest time reasonably consistent with the best interests of the estate, to collect in a sufficient amount of the assets to pay the just debts of the estate, and the specific bequests mentioned in the will; to defend the estate against all unjust claims; to ascertain and collect in all outstanding claims not well secured; and to ascertain and settle the net amount of the assets, and report the same, with a full account of his doings in relation thereto, to the probate court, and obtain its order for such further disposition of the same as may be proper to make.

d—To work for the best interests of the estate at all times, and so to keep, manage, and invest the property of decedent, that it can be turned over to the persons entitled to it, freed from complications with his own, or the property of others, at the earliest moment consistent with good management.

e—In case of doubt as to the proper construction of the will in regard to final disposition of the estate, to apply to the proper court, and have the matter settled, and take its direction in reference thereto. 456 (2).

3. Where the representative of the surviving partner files a bill offering to account for his intestate's administration of the firm assets, and the account he presents is so imperfect, confused, and manifestly fraudulent as to be an insufficient basis for accounting, and unfit for judicial investigation, and it appears that the surviving partner trafficked with the firm assets, and made large profits therewith, but has destroyed or suppressed the evidence, so that the amount of such profits cannot be ascertained with any degree of certainty, the rules of equity will not require the share of the deceased partner to be ascertained from such fragmentary and imperfect evi-

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PARTNERSHIP.—Continued.

dence as remains, or as the trustee or his representative sees fit to furnish. 457 (10).

4. In such case, where the share of the deceased partner in the firm at his death is known or can be ascertained with reasonable certainty, the court will apply the well-known rule that a *cestui que trust* may either follow the fund, and take it and the profits, or take the fund, with interest, in lieu of profits, to be computed in such manner and at such rate as will, in view of all the facts and circumstances, be in accordance with the principles of equity and justice. In such case the fraudulent trustee must be held to have elected, in taking the course he did, that this rule might be applied in case equity should be resorted to in the settlement of his accounts, and his estate must abide thereby. But in giving such summary relief the court will not omit to take into consideration the consequences of its decree, and will consider them in connection with the other circumstances in the case, and see to it that an oppressive or unjust result shall not be reached. *Id.* (11).

5. A surviving partner, who was also executor of the deceased partner, was guilty of gross fraud in the administration of his trust. He filed a false inventory in the probate court. He converted the entire assets of the firm, and most of the individual estate of the decedent, to his own use, and covered up his fraud by false entries in books, and by suppression and destruction of books, papers, and documents. He trafficked with the assets, and made large profits, though, on account of his manipulations of the books, the exact amount thereof cannot be ascertained. When the heir filed a bill against him for an accounting, he answered with a false and fraudulent statement, showing that nothing was due, and after the death of the heir substantially repeated these statements in his answer to a bill brought by the heir's widow and sole devisee. He persistently evaded and resisted judicial investigation in the probate court, and elsewhere, and died 15 years after his partner, in 1880, without having accounted. His administrator, after resisting for years all attempts to get at the true state of the firm's books in the probate court, filed a bill offering to account with the representatives of the deceased partner, but attached no account of his intestate's administration. A demurrer to his bill on this ground

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PARTNERSHIP.—Continued.

having been sustained by this Court, he presented accounts which were found to be false and fraudulent, and insufficient to be made the basis of an accounting, and unfit for judicial investigation.

Held, that no further accounting is necessary, and that the representatives of the deceased partner, after a contest of 24 years for their rights, are entitled to summary relief; and, it appearing that the interest of the latter in the firm at his death, in 1864, was at least $104,000, a decree is granted for that sum, with interest at 10 per cent. to the time of the trustee's death, in 1880, amounting to $262,715.55, and to this amount interest is added at 7 per cent. to the date of the decree, November 28, 1888, the whole amounting to $426,029.66, together with costs of both courts, and a counsel fee of $20,000. 459 (17).

6. In this case a relative of the fraudulent trustee, and who was made a party, claimed to have been a partner, and asked for an accounting. But it appeared that he contributed no capital to the firm, and that he was cognizant of and participated in most of the fraudulent devices by which the representatives of the deceased partner were sought to be defrauded.

Held, that the latter are not to be embarrassed by the vexation, expense, and delay in the determination of his rights, if any; that their claim is to be first paid, and the bill may be retained for such further proceedings as are necessary to adjudicate his claim, if he desires so to do, against the trustee's estate. *Id.* (18).

7. A surviving partner, who was executor of the deceased partner, was also tenant in common with him of certain mill property, and he assumed to be guardian of the decedent's only son. On the day the latter became of age, or about that time, the surviving partner entered into agreements with the heir, who was without any experience in the management of property, authorizing the former to make certain improvements on the tenant in common property, and to charge therefor certain gross sums mentioned therein. Other agreements of like nature were made shortly after. These all assumed that the interest of the deceased in the firm was worthless, and amounted to an assignment by the heir to the surviving partner of the rents and profits in considera-

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PARTNERSHIP.—Continued.

tion of making advances. In reality the firm had a large surplus, in which the interest of the deceased partner was over $100,000.

Held, that the agreements were fraudulent, and not binding upon the heir. 460 (19).

See JUDGMENT CREDITOR'S BILL; TRUSTEES.

PARTNERSHIP BOOKS—See EXECUTORS AND ADMINISTRATORS (2).

PAYMENT—See EVIDENCE (8).

PLATS—See TOWN PLATS.

PLEADING.

1. A notice of recoupment ought to be as specific as a declaration. 49 (1).
2. It is well settled that one cannot sue for the breach of one duty, and recover for the breach of another. 355 (4).
3. A declaration in a suit under the statute against the indorser as well as the maker, must set forth a paper title accordingly. 393 (6).
4. A defense which is confined to a refutation of the facts stated in the declaration, and necessary to be proved in order to enable the plaintiff to recover, may be made under the general issue. 623 (2).
5. In an action under How. Stat. § 2119, to recover damages for injuries sustained from an assault by a vicious dog, the plaintiff need not aver the knowledge of the owner or keeper that the dog was accustomed to do such damage or mischief. 642.

POOR-HOUSES.

The board of supervisors have exclusive authority over the subject of the erection of poor-houses in their county. 295 (1).

POSSESSION OF LAND—See ADVERSE POSSESSION; LEASE.

PRACTICE IN CIRCUIT COURT.

The failure of the defendant in a suit upon a certificate of insurance, the issuance of which in the usual form, is averred in the declaration, to deny such averment under circuit court rule 79 amounts to such an admission as will support a verdict in favor of plaintiff, although the certificate is not introduced in evidence. 317 (6).

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PRELIMINARY EXAMINATION—See CRIMINAL LAW (2, 7).

PRESUMPTION.

Where certain leaves appear to have been removed from an assessment roll, and the certificate of the supervisor is found to be wanting, and in the absence of proof that the roll or the absent leaves ever contained it, no presumption arises of such fact. 118 (2).

See EVIDENCE (8, 23).

PRESUMPTION OF CASH SALE—See EVIDENCE (16).

PRINCIPAL AND AGENT.

1. In this case plaintiff is held not to have made a case on his own testimony; that the defendant's station agent had no authority to employ plaintiff, and that its superintendent never assented to such employment. 160 (1).
2. A principal cannot ratify the fraud of an agent by accepting a note which is the fruit of such fraud, and suing upon it, and at the same time claim to be a good-faith holder of the note because the agent failed to acquaint him with the circumstances under which he procured it when he sent it to the plaintiff, who was led to suppose that he had taken it in the ordinary course of his agency. 266 (5).
3. A lease of land for more than one year, executed by an agent without written authority and delivered to the lessee, is void under the statute of frauds, and is not validated by the after execution of a duplicate by the principal, of the existence of which the lessee is ignorant. 438 (2).

PROSECUTING ATTORNEY—See CRIMINAL LAW (29–32).

PUBLIC BUILDINGS.

1. Members of a board of supervisors, appointed by the board to act as a committee in conjunction with the superintendents of the poor to let a contract for rebuilding a county poor-house, and who let said contract in behalf of the county, are agents of the board within the intent and spirit of section 1 of Act No. 45, Laws of 1885, requiring in such cases the execution of a bond by the contractor for the payment of labor and materials. 295 (2).
2. Act No. 94, Laws of 1883, making it the duty of officers who contract for the erection of public buildings to require security from the contractor for the payment of claims for labor and materials, is held constitutional by a majority of the Court. *Id.* (3).

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QUESTIONS OF LAW.

The question of the ownership of estimates of timber, made by a land-looker for a land-owner, and paid for by the latter, is one of law. 630 (2).

RAILROAD COMPANIES.

1. It is not for a jury to determine whether the work done by a plaintiff under the orders of a station agent, who had no authority to contract for a railroad company, was beneficial to the company, which, acting through its proper officers, had the right to determine whether or not it wanted the services of a porter at the station. 160 (2).
2. A railroad company has a right to prohibit passengers from riding on freight trains, or to prescribe the conditions on which they may ride. 355 (1).
3. A rule adopted by a railroad company forbidding conductors of freight trains from receiving or taking fare from any person traveling on their trains, or from allowing any person to travel as a passenger without the written order of the superintendent or assistant superintendent in charge of the district, except on such way freight trains as are printed in time-tables, is a reasonable one, and within its power to prescribe. *Id.* (2).
4. In such a case it is the duty of the conductor to cause a passenger to leave his train if attempting to ride without such permit, and he is not to be governed in his action by any arrangement the passenger claims to have made with the ticket agent, where the ticket purchased only entitles him to ride on passenger trains. *Id.* (3).
5. It is impracticable to keep off trespassers from an open railway track, and all who go upon it do so on their own risk of such dangers as are incident directly to such use. 619 (1).
6. Under all the decisions made in this State on the subject, a railway company which has provided all reasonable facilities for ingress and egress from its station-houses has done its full duty in that regard, and cannot be bound to suppose that passengers who do not know the way will neglect the means open to their sight, and go off in the darkness somewhere else. *Id.* (2).

See CONDEMNATION PROCEEDINGS.

RAPE—See CRIMINAL LAW (11, 20).

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RATIFICATION—See PRINCIPAL AND AGENT (2, 3).

REAL ESTATE AGENT—See EVIDENCE (7).

RECEIVER—See JUDGMENT CREDITOR'S BILL.

RECORDING LAWS.

The object of the registry law is to protect *bona fide* purchasers, and a failure to record a deed will not divest the grantee of his rights except as to a *bona fide* purchaser or incumbrancer. 847 (4).

RECOUPMENT.

1. A notice of recoupment ought to be as specific as a declaration. 49 (1).
2. In this case it is held that no legal contract was made out by defendant, and that there was nothing for the jury to pass on by way of recoupment. *Id.* (2).

RELEASE OF SURETIES—See BOND.

REPLEVIN.

Replevin will not lie for saw-logs seized to satisfy taxes assessed thereon in a township where the logs were liable to assessment, which assessment appears by the roll to be in all respects regular and valid. 660 (5).

REPURCHASE—See CONTRACT FOR REPURCHASE.

REQUESTS TO CHARGE.

1. A request which asks the court to charge the jury what the evidence shows is rightly refused. 660 (3).
2. When counsel bases an argument to the jury upon a state of facts unsupported by the testimony, it is error to refuse to instruct the jury that no such facts have been proved, when requested by the opposing counsel at the close of the argument. 669 (2).

RESIDENCE—See ELECTIONS.

RETROSPECTIVE STATUTE—See TAXES (19).

RETURN—See CERTIORARI.

REVISED STATUTES OF THE UNITED STATES.

The Revised Statutes of the United States, being a new act of legislation, cannot be governed by previous legislation when they differ from it. 43 (3).

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SALE.

1. A vendee who discovers a *latent* defect in an article purchased by sample, and for a particular purpose, known to the vendor, after its delivery, may return it to the vendor. 868 (1).
2. Where the payor in certain notes agreed with the payee to send him at a designated place certain goods, on which the payee was to pay the freight, and indorse a given sum on the notes, the sale is complete on receipt of the goods, at which date the payor is entitled to have the indorsement made. 840.

See CHARGE TO JURY (1); EVIDENCE (7, 14–16).

SAWING CONTRACT—See EVIDENCE (17).

SCALE—See EVIDENCE (17).

SECTION CORNERS—See TAXES (12).

SEDUCTION—See CRIMINAL LAW (85).

SENTENCE—See CRIMINAL LAW (25–28).

SETTLEMENT—See EVIDENCE (18); TOWNSHIP TREASURER.

SIGNATURE—See EVIDENCE (4, 5, 10).

SPECIFIC PERFORMANCE.

1. Where pursuant to a mutual agreement resting partly in parol, and involving the disposition of land, a father and mother made their respective wills, and the father died leaving his will unrevoked, and the mother accepted the provisions made in her favor therein, there has been such a performance and acceptance as takes the agreement out of the statute of frauds, and equity will decree performance by the mother, or take such steps as will prevent her from violating her part of the contract, in fraud of the rights of parties interested therein. 76 (2).
2. The specific performance of an agreement by grantees who have taken possession of the land conveyed to them, which is located in another state, to secure the unpaid purchase price by note, and a mortgage upon the land, will be enforced in equity. 311.

STATUTE OF FRAUDS.

A lease of land for more than one year, executed by an agent without written authority and delivered to the lessee, is void under the statute of frauds, and is not validated by the

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STATUTE OF FRAUDS.—Continued.

after execution of a duplicate by the principal, of the existence of which the lessee has no knowledge. 488 (2).

STATUTE OF LIMITATIONS.

1. Upon the facts stated in the opinion, it is held that, if complainants ever had any claim of title to the premises in controversy which they could have asserted against the defendants, it is now barred. 86 (5).
2. Making a complaint in a criminal case is not such a commencement of suit as will prevent the running of the statute of limitations. 116 (1).
3. How. Stat. § 9507, deducting from the statutory period of limitations the time during which the party charged was usually or publicly a resident within this State, does not apply to prosecutions for seduction. *Id.* (4).

See CRIMINAL LAW (33–36); MARRIED WOMAN.

STATUTE OF USES AND TRUSTS—See PAROL TRUST IN LAND.

STATUTES CONSTRUED.

1. Standing, growing trees are not "forest products," within the meaning of section 11, subdivision 4, of the tax law of 1885. 18 (2).
2. Section 2292 of the Revised Statutes of the United States covers every case where there are *minor* children surviving *both* parents, and in terms gives them the entire estate in an *uncompleted* homestead entry to the exclusion of the adult children. 43 (6).
3. How. Stat. § 2275 (providing for the punishment of violators of the liquor law), contemplates an *immediate* imprisonment, which may continue 90 days, with or without payment of the fine and costs. 59 (1).
4. The Married Woman's Act of 1855 relieved married women from all disability to bring actions in their own right. 86 (1).
5. The purpose of How. Stat. § 6179, is to preclude parties from asserting equitable interests in lands where they must rest upon parol evidence in opposition to the written instruments of title which have been made with their consent and approval. *Id.* (4).
6. Under How. Stat. §§ 1326, 1327, the money tax authorized to be raised for highway purposes, not exceeding 50 cents on the $100 valuation, should be spread according to the assessed valuation of the *preceding* year. 101 (8).

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STATUTES CONSTRUED.—Continued.

7. How. Stat. § 9507, deducting from the statutory period of limitation the time during which the party charged was not usually or publicly a resident within this State, does not apply to prosecutions for seduction. 116 (4).
8. Act No. 191, Laws of 1883, includes the widow, who is "a person," and who is injured in her "means of support" by the death of her husband from intoxication, or by reason of the intoxication of himself or another person. 122 (1).
9. Act No. 191, Laws of 1883, *itself* fixes the liability for the damage recoverable under it upon the person selling or furnishing the liquor which caused the intoxication. *Id.* (2).
10. Under How. Stat. § 3917, as amended by Act No. 80, Laws of 1883, a log-running company has the right on the streams where it can lawfully do business to construct, use, and maintain all necessary booms for that purpose, the location, extent, manner of construction, and number of which are left to its own determination, subject to the statutory restriction that, as far as practicable, they must be constructed and used in such a manner as to allow the free passage of boats, vessels, crafts, logs, lumber, timber, or other floatables along the stream. 134 (1).
11. Under How. Stat. § 1381, the opinion of the commissioner of highways as to the cost of repairing a bridge must prevail, and *mandamus* will not be granted to compel such repairs, *on his own motion*, where in his return he shows that in his opinion the cost will exceed $1,000. 152.
12. The tax law of 1885 was *prospective* only in its operation, and a sale of land under its provisions for the taxes of 1882 and 1883 is absolutely void. 202 (1).
13. How. Stat. § 8744, was intended to give to the creditors of an insolvent debtor ample relief against the incompetency, neglect, or fraud of the assignee. 235 (1).
14. A creditor may file a bill, under How. Stat. § 8744, to set aside a chattel mortgage, alleged to have been given in anticipation of an assignment by the mortgagor, and to secure to the mortgagee a preference, to which transaction the assignee is alleged to have been a party, without obtaining an order from the court requiring the assignee to institute proceedings to annul such mortgage. *Id.* (2).
15. The object of the act of Congress (5 Stat. at Large, 657) "for the relief of citizens of towns upon the lands of the United

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STATUTES CONSTRUED.—Continued.

States, under certain circumstances," and of Act No. 204, Laws of 1861, authorizing the district judge of the Upper Peninsula to convey certain lands held in trust under said act of Congress, was to protect the rights of *actual* occupants, which is fully done by extending to them the principles which have been so often applied for a like purpose when a proprietor of land has platted it into a town-site, but not so as to effect a legal dedication, and sold land to individuals in accordance with the plat. 249 (2).

16. Congress intended by the act of 1844 (U. S. Rev. Stat. § 2387) that as to unoccupied lots the Legislature might authorize the trustee to make a survey and plat, and dedicate the streets and public grounds to the public use, or it might authorize a sale in such parcels as it should deem the situation of the town, its probable future, and its circumstances should require. 250 (*b*).

17. The mention by the Legislature in a recital to Act No. 204, Laws of 1861, of the fact that the lands held in trust by Judge Goodwin had been surveyed and laid out in town lots and blocks, and are known as the village of Ontonagon, and additions thereto, does not expressly adopt or ratify such survey or plat, if, indeed, it would be competent for it to do so. The legal title had passed from the United States to the trustee, and he would be the only competent person to dedicate the land to public uses. *Id.* (*c*).

18. The damages recoverable under Act No. 92, Laws of 1877 (substantially re-enacted in 1887), cannot be lessened by the fact of sales by others to the minor, and proof of such sales is admissible in a suit for their recovery. 285 (5).

19. In a suit under Act No. 92, Laws of 1877, for the sale of liquor to a minor, the plaintiff may recover $50 *actual* damages at least, and such *exemplary* damages as the jury see fit to award under all of the circumstances of the case, not exceeding in *all* the amount claimed in the declaration. *Id.* (6).

20. Under chapter 40, How. Stat., the assessment was made by the drain commissioner, and the action of the supervisor was merely ministerial, for the purpose of collection; he having no authority to change or modify such assessment, nor to review it in any manner, but his duty simply being to levy

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STATUTES CONSTRUED.—Continued.

the amount assessed by the drain commissioner upon his tax roll. 336 (2).

21. Under the drain law of 1881 (chapter 40, How. Stat.) the mere delay of the drain commissioner to present the assessment list to the supervisor, or of the supervisor in extending it upon the tax roll, did not invalidate the lien attaching to the land from the time of the assessment of benefits by the drain commissioner. *Id.* (3).

22. The object of the registry law is to protect *bona fide* purchasers, and a failure to record a deed will not divest a grantee of his rights except as to such a purchaser or incumbrancer. 847 (4).

23. An assessment of property, and its review, in the spring of 1885, made under the tax law of 1882, was valid, and such tax proceedings could be completed under the law of 1885. 415 (1).

24. The *labor* and *money* tax which the electors of a township are authorized to vote under How. Stat. § 1327, is not intended to meet anything but the ordinary improvement of the highways and bridges of the township during the year. *Id.* (2).

25. The right of the commissioner of highways to expend $1,000 in the building and repairing bridges in his township during the year, and to cause said sum to be certified to the supervisor for assessment, under How. Stat. §§ 1379, 1380, is not affected by the voting of a labor and money tax by the electors under How. Stat. § 1327. *Id.* (3).

26. How. Stat. § 4225, was not intended to nor does it apply to co-operative and mutual benefit associations. 603 (1).

27. Act No. 187, Laws of 1887, does not apply to an Illinois corporation organized to establish a secret order, which shall cultivate social and fraternal relations among the members, and furnish aid to those who may become sick or disabled, but which requires no payment of annual dues or premiums, all aid and assistance being by voluntary subscription. 604 (4).

28. Taxes for 1882 and 1883, properly assessed under the tax law of 1882, became a lien upon the land, enforcible under the tax law of 1885 *after* the tax law of 1887 took effect, but the assessment is governed by the law of 1882. 633 (1).

29. In an action under How. Stat. § 2119, to recover damages for injuries sustained from an assault by a vicious dog, the

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STATUTES CONSTRUED.—Continued.

plaintiff need not aver the knowledge of the owner or keeper that the dog was accustomed to do such damage or mischief. 642.

30. The provision of Act No. 153, Laws of 1885, § 5, that the firm name shall be used in assessing property owned or occupied by a copartnership whenever the name of the owner or occupant is required to be entered upon the assessment roll, is directory, and must be construed in connection with section 89 of the same act, which declares that no tax shall be held invalid on account of having been assessed in the name of any other person than the owner. 659 (1).

STREET—See BURDEN OF PROOF (1); EQUITY (3).

SURETIES—See BOND.

SURVIVING PARTNER—See PARTNERSHIP; TRUSTEES; WILL.

TAXES.

1. The ownership of standing, growing timber is an interest in the land itself, and assessable as realty. 18 (1).
2. Standing, growing trees are not "forest products," within the meaning of section 11, subd. 4, of the tax law of 1885. *Id.* (2).
3. Standing timber, reserved on a sale and conveyance of land, is not assessable as personal property, but the land should be assessed at its true cash value, which should include said timber. *Id.* (3).
4. Prior to notice of distribution, logs and lumber, belonging to the estate of a deceased person, in the hands of the executor, are assessable to such executor in the town in which the deceased last dwelt. 25 (1).
5. The intent of the Legislature, in framing the tax law of 1885, was that all forest products should be assessed where the same may be, except that, where such property is in transit to some place within the State, it shall be assessed at such place, and that all goods and chattels situate in some township other than where the owner resides shall be assessed in the town where situate, if the owner or person having control thereof hires or occupies a store, shop, mill, dock-yard, etc., for use in connection with such goods and chattels, excepting, however, that personal property belonging to the estates of deceased persons, in the hands of executors and

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TAXES.—Continued.

administrators, shall be assessed to them in the town where the deceased last dwelt, until they shall give notice that the estate has been distributed to the parties interested. *Id.* (2).

6. Every essential proceeding in the course of a tax levy must be taken in conformity to the requirements of law; but the evidence whether or not this has been done is only such as is required to prove similar facts in other cases. 100 (1).

7. Whenever the law requires written evidence of the action taken by officers in tax proceedings, the record becomes the only legal and proper evidence of these facts; but this does not exclude entirely the usual presumptions in favor of the regularity and honesty of official action. *Id.* (2).

8. A certificate upon the assessment roll signed by the supervisor, and one of the members of the board of review appointed by the town board, and by one not so appointed, sufficiently shows that a legally constituted quorum existed and reviewed the roll. *Id.* (3).

9. In a suit to recover taxes alleged to have been illegally assessed, the question of the legality of a division of the township by the board of supervisors cannot be inquired into. *Id.* (4).

10. The "ordinary expenses" of a township can never include less than the necessary expenses incurred in administering the government of the township, under the statutes creating it and relating thereto, in such manner as will best promote the convenience, peace, health, prosperity, and happiness of the people residing therein. *Id.* (5).

11. A liquidated indebtedness due on the division of a township to the new township, and the special or contingent fund to meet such exigencies as cannot be foreseen, and which may arise at any time in conducting township affairs, requiring the use of money, are included in "ordinary expenses," and are such as the town board may vote to raise on the neglect or refusal of the electors to do so. *Id.* (6).

12. Expenses incurred in establishing lost section corners, and in building a town-hall, are not included within the "ordinary expenses" of the township, and should be provided for by a vote of the electors, and not of the town board. *Id.* (7).

13. Under How. Stat. §§ 1326, 1327, the money tax authorized to be raised, for highway purposes, not exceeding 50 cents

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TAXES.—Continued.

on the $100 valuation, should be spread according to the assessed valuation of the *preceding* year. 101 (8).

14. Payment of taxes assessed on real estate, made prior to January under a specific protest, as provided by the tax law of 1882, is not a voluntary payment. *Id.* (9).

15. A return of land by the town treasurer is essential to a valid sale of said land for taxes. 113 (1).

16. Where on the introduction of an assessment roll from which certain leaves appeared to have been removed, the supervisor's certificate was found to be wanting, and no proof was made that the roll or the absent leaves ever contained it, no presumption arises of such fact. *Id.* (2).

17. The tax law of 1885 was prospective only in its operation, and a sale of land under its provisions for the taxes of 1882 and 1883 is absolutely void. 202 (1).

18. Section 2 of Act No. 17, Laws of 1887, which attempts to validate sales made under the tax law of 1885 for taxes assessed prior to the passage of the act, is unconstitutional. *Id.* (2).

19. It is competent for the Legislature, by a retrospective statute, to cure defects in legal (tax) proceedings where they are in their nature irregularities only, and do not extend to matters of jurisdiction, unless expressly forbidden so to do; but the proposition that the Legislature can make good that which was void when done, is utterly at variance with the fundamental principles of law. *Id.* (3).

20. An assessment of property, and its review, in the spring of 1885, made under the tax law of 1882, was valid, and such tax proceedings could be completed under the law of 1885. 415 (1).

21. The *labor* and *money* tax which the electors of a township are authorized to vote under How. Stat. § 1827, is not intended to meet anything but the ordinary improvement of the highways and bridges of the township during the year. *Id.* (2).

22. The right of the commissioner of highways to expend $1,000 in the building and repairing of bridges in his township during the year, and to cause said sum to be certified to the supervisor for assessment, under How. Stat. §§ 1879, 1880, is not affected by the voting of a labor and money tax by the electors under How. Stat. § 1827. *Id.* (3).

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TAXES.—Continued.

23. A record showing that at a meeting at which the commissioner of highways and township clerk were present, "on footing the several amounts expended during the year in the construction and repairing of bridges in the township, it was found to amount to $1,000, whereupon the commissioner directed the clerk to certify to the supervisor such amount to be assessed to pay for such construction and repairing," is sufficient; and it will be presumed from such a record that orders had been issued under How. Stat. § 1880, and were before said officers, from which said footing was made, in the absence of some counter-showing. *Id.* (4).

24. Taxes for 1882 and 1883, properly assessed under the tax law of 1882, became a lien upon the land, which lien could be enforced under the tax law of 1895 *after* the tax law of 1887 took effect, but the assessment is governed by the law of 1882. 638 (1).

25. The board of supervisors have no power to raise, as a part of the county tax, money to be expended generally upon the highways in a township. *Id.* (2).

26. A supervisor can only assess such taxes as are properly certified to him by the township clerk for assessment, unless evidenced by other proper official action, and such as the law makes it his duty to assess without such clerk's certificate. *Id.* (3).

27. The provision of section 5, Act No. 153, Laws of 1885, that the firm name shall be used in assessing property owned or occupied by a copartnership whenever the name of the owner or occupant is required to be entered upon the assessment roll, is directory, and must be construed in connection with section 89 of the same act, which declares that no tax shall be held invalid on account of having been assessed in the name of any other person than the owner. 659 (1).

28. The decision in this case, and in *Lumber Co. v. Collins*, 66 Mich. 64, and in *Dairy Co. v. McKinlay*, 70 Id. 574, in so far as the question of the assessment of personal property in a firm name is involved, is based upon the facts appearing in the record, that the assessment was made and the collection sought to be enforced against the rightful owners, and that the roll contained sufficient notice to them that their property was assessed, the underlying principle being that a person whose property is liable to assessment for taxes shall not be

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TAXES.—Continued.

permitted to evade payment of his just proportion of the public burden by any errors, omissions, or irregularity that do not prejudice his rights. 660 (2).

29. The charge of the court on the question of when logs are in transit is held as favorable to the plaintiff, at least, as he had a right to expect. *Id.* (4).

30. Replevin will not lie for saw-logs seized to satisfy taxes assessed thereon in a township where the logs were liable to assessment, which assessment appears by the roll to be in all respects regular and valid. *Hood v. Judkins*, 61 Mich. 576 (head-note 5). *Id.* (5).

See DRAINS.

THREATS—See DURESS.

TIMBER.

The ownership of standing, growing timber is an interest in the land itself, and such trees are not "forests products," within the meaning of the tax law of 1885, and if reserved on a sale of the land, are not assessable as personal property, but as a part of the land. 18.

TIMBER ESTIMATES.

The question of the ownership of estimates of timber, made by a land-looker for a land-owner, and paid for by the latter, is one of law. 630 (2).

TITLE TO LAND—See ADVERSE POSSESSION.

TOWN HALL—See TAXES (12).

TOWN PLATS.

As between the proprietor of land which he has platted into a town-site, but not so as to effect a legal dedication, and purchasers from him according to said plat, they are entitled to have the streets necessary or convenient for their use and enjoyment of the property so purchased kept open for their own and the public's use. But such proprietor is not estopped from reclaiming or closing any street or portion thereof delineated on the plat, where private rights are not directly affected, and as against the municipality claiming the streets, where the public have not acquired rights by user, or acceptance of the offer to dedicate, indicated by the platting, the owner is not estopped. He may revoke or recall said offer

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TOWN PLATS.—Continued.

before actual acceptance at any time, when the plat has not been executed in accordance with the statute, and placed upon record. 249 (3).

TOWNSHIP TREASURER.

Where the amount due from a township treasurer is undisputed, and no well-grounded apprehension exists as to the legal liability of his bondsmen for the debt, the township board has no power to release them from its payment. 1 (3).

TOWN-SITE.

The object of the act of Congress (5 Stat. at Large, 657) "for the relief of citizens of towns upon the lands of the United States, under certain circumstances," and of Act No. 204, Laws of 1861, authorizing the district judge of the Upper Peninsula to convey certain lands held in trust under said act of Congress, was to protect the rights of *actual* occupants, which is fully done by extending to them the principles which have been so often applied for a like purpose when a proprietor of land has platted it into a town-site, but not so as to effect a legal dedication, and sold land to individuals in accordance with the plat. 249 (2).

TRUSTEES.

1. The refusal of the trustee while living, and his representative after his death, to furnish information regarding the condition and management of the estate, and exhibit his account showing the result of the same, and the amount of the estate, after the trust had expired, to those entitled thereto, when properly requested, severely criticised and condemned. Fairness between tenants in common, a relation creating the lowest grade of trusts, requires that this should be done. 455 (6).
2. A surviving partner, who is also made executor of the last will and testament of the deceased, and who assumes the guardianship of his only son, takes upon himself the most sacred obligations that can be imposed upon any trustee; and when the authority of a court of equity is properly invoked it will take care that the interests of the beneficiaries are protected, and will exercise great vigilance in scrutinizing the manner in which the trustee has discharged his trust obligations. 456 (7).

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TRUSTEES.—Continued.

3. The precise sum the *cestui que trust* shall receive or the trustee should pay is that which the former has lost by the failure of the latter to honestly and properly administer the trust. Where the trustee has misappropriated the funds, or neglected to properly invest them, the *cestui que trust* will be presumed to have lost at least the lawful interest upon the same; and, if the fund has been so used that the accumulations in the hands of the trustee reached beyond interest upon the fund, the court will decree to the *cestui que trust* as his loss whatever may have been so received. *Id.* (12).

4. If a trustee fails or refuses to account, he may be charged with the trust fund, and such accumulations thereon as the best management of the most successful business man would be likely to secure for it. It will be presumed he has received so much or he would have reported his gains. If such gains be greater than compound interest, that may be allowed to the beneficiary; not on the ground that the fund is presumed to have earned a larger sum, but because the court will not allow the trustee to profit by his own wrong, and because as between him and the beneficiary the latter has the better right to the excess. 458 (13).

5. Where a trustee has shown an utter disregard for the interests of the beneficiary, and has deliberately planned to absorb the trust fund by his fraudulent appropriation thereof to his own use, and has attempted to destroy or suppress evidence of his management of the fund, and the profits received therefrom, and has so far succeeded in his purpose that no one but himself can trace the fund or its accumulations, and if, when called upon to account, he refuses so to do, or renders false and fictitious accounts, so defective as to be impossible of proper judicial investigation, in such case, if the amount of the fund which he has used can be ascertained, he may be charged with it, and the largest profits that can lawfully be made thereon by the most sagacious and expert business men, in their management of money, even to the allowing of compound interest at the highest lawful rates, and making rests annually or semi-annually, if it shall appear just and equitable to the court, in order to secure to the *cestui que trust* the profits of his property of which he has been deprived. *Id.* (14).

6. The law entitles the *cestui que trust* to all the accumula-

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TRUSTEES.—Continued.

tions of his property while in the trustee's hands; and under such circumstances as are mentioned in the preceding paragraph, when the trustee refuses to account, it will be presumed he has received such accumulations so estimated, and that such is the beneficiary's loss, and a court of equity will award it to him. Such an award is not for the purpose of punishing or imposing a penalty on the trustee for his maladministration of the trust. Courts of equity do not impose or enforce penalties, or punish parties for their wrongs in the administrations of trusts, but only furnish adequate means of redress; beyond this they do not go, unless so directed by the law-making power. *Id.* (15).

See WILL.

UNCOMPLETED HOMESTEAD ENTRY—See HOMESTEAD LAWS (2).

USES AND TRUSTS—See PAROL TRUST IN LAND.

VERIFICATION.

An answer, filed under chancery rule 123 which seeks affirmative relief, must be verified. 43 (2).

VICIOUS DOG—See PLEADING (5).

VOLUNTARY CONVEYANCE.

A voluntary conveyance is not void as to creditors, even though the grantee is indebted at the time, if he retains ample means to pay his debts. 347 (3).

VOTER—See ELECTIONS.

WAIVER—See CHARGE TO JURY (1).

WILL.

1. In this case the testator is held to have intended to pass by his will his rights under a certificate of insurance in a benefit association. 7.
2. A person may enter into a valid agreement binding himself to make a particular testamentary disposition of his property. 76 (1).
3. A testator, by his last will, gave to his son and only child, a minor, at the age of 21, $3,000, and $1,000 annually thereafter, until 25 years old, when he was to have $10,000 more, if, in the opinion of the executors named, he had used the

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WILL.—Continued.

amounts received in a judicious, frugal manner; and at the age of 35 years, or sooner, if the executors thought best, and upon the same conditions, he was to receive the possession of the balance of his father's estate, both real and personal, not otherwise disposed of under the will; but if at 25, and after the receipt of the $10,000, the son had squandered and wasted what he then had received, and if in the opinion of the executors, he would continue to do so, he was then to receive but the $1,000 annually, and the estate, subject to other provisions of the will, was to go to the legal issue of the son, and, if he died without issue, it was then to pass to the testator's legal heirs.

Held, that such will did not convey the estate to the executors named in trust, but only made them executors, with certain additional powers, under which, in certain contingencies, the estate might be made to pass from the son to others after the son had arrived at the age of 35 years. 454 (1).

4. There were five persons named as executors in the will, but one of whom qualified. He was a surviving partner of the intestate, and acted for 15 years as executor, and died without having rendered any account of his trust, and without paying the son anything after he was 24 years of age, who married and died without issue, leaving all his estate to his wife by will. The sole executor never passed upon the son's habits or conduct, and never undertook to exercise the power given to all the executors in that regard.

Held, assuming the power given by the will to be valid, it could not be executed by the sole executor, and after the death of the son could never be executed by any one; that upon the death of the father the title to the real estate vested in the son, and the son became the owner of all testator's personal property, subject to the debts of the estate and the special legacies, and which estate under the son's will, upon his death, passed to his widow, and the heirs of the father had no interest in the estate whatever, that it was not necessary for the son to reduce the estate willed to him to his possession before he could dispose of it, by will, to his wife. 455 (2).

WITNESSES—See CRIMINAL LAW (3, 7).

"WOODS SCALE"—See EVIDENCE (17).

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Laws Referred To.[1]

Constitution of Michigan.[2]

	Page.
Art. iv. § 19	453
Art. iv. § 28	453
Art. vii. §§ 5, 7	401

Howell's Statutes.

	Page.
Chap. 80	405
Page 1085	633
§ 509	107
671	106
672	108
750	106
1326, 1327	108, 418
1379, 1381	157, 418
2119	643
2268, 2269	286, 288
2274, 2275	60
2420	405
3313	225
3328	227
§ 3332	222
3391, 3392, 3491	125
3917	137
4225	604, 608, 612, 613, 614
4244	609, 610, 612, 614
4246	609, 610
4249	653
6179	99, 443, 444
7247	334
8313, 8314	125
8744	239
9470, 9471	337
9507	118, 121
9549	371

Session Laws.

1839, Pages 31, 32	403
1858, Act 11	255
1861, Act 204	255
1869, Act 77	613
1869, Act 104	613
1871, Act 80	614
1873, Page 244	405
1877, Act 29	614
1877, Act 92	286, 288
1881, Pages 39, 177 (Local)	405
1882, Act 9, § 23	641
1882, § 42, Page 20	109
1883, Act 80,	137
1883, Act 94	297
1883, Act 181	610, 614
1883, Act 191	124, 126
1883, Act 326, Chap. 7, § 33 (Local)	246
1883, Pages 47, 160, 240, 340 (Local)	405
1883, Page 585 (Local)	404
1885, Act 45	297, 300
1885, Act 153, §§ 1, 2, 5, 6, 10	21, 22, 28
1885, Act 233	563
1885, Page 286 (Local)	404
1885, Pages 354, 479 (Local)	405
1887, Act 17	205, 639
1887, Act 187	611
1887, Act 187, § 27	610
1887, Act 254	30
1887, Act 500	447
1887, Page 141 (Local)	406
1887, Page 153	564
1887, Page 294	227
1887, Page 665 (Local)	449
1887, Page 770 (Local)	406
1887, Page 908 (Local)	404

[1] See Statutes Construed.

[2] See Constitutional Law.

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